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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

YAVAPAI-PRESCOTT INDIAN TRIBE
Petitioner,

versus

JAMES G. WATT, ET AL.
AND MARLIN D. KUYKENDALL

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Is the Ninth Circuit's decision that Indian tribes have no power to vindicate their rights through cancellation of Secretarially approved leases of tribal lands, in conflict with the Congressional policy of self-determination and federal concepts of tribal sovereignty announced by this Court?

II. Does an Indian tribe have the sovereign power to exercise civil jurisdiction over a lease dispute between the tribe and a non-Indian lessee of tribal land, doing business on the reservation under a Secretarially approved lease with the tribe?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES CITED	v
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING WRIT	6
I THE NINTH CIRCUIT DECISION AFFECTS ALL INDIAN TRIBES BY SIGNALLING AN END TO THE POLICY OF ENCOURAGEMENT OF TRIBAL SELF-GOVERNMENT AND THE STIMULATION OF INDIAN ECONOMIC AND COMMERCIAL DEVELOPMENT	6
II THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT UPHOLDING TRIBAL SOVEREIGNTY AND THE POWER OF INDIAN LESSEES TO VINDICATE THEIR RIGHTS UNDER LEASES OF INDIAN LAND	8
A. The Ninth Circuit's Decision is in Conflict with Concepts of Tribal Sovereignty Announced by this Court	8
B. The Ninth Circuit's Decision Conflicts with this Court's Decision in *Poafpybitty v. Skelly Oil Company*	12

TABLE OF CONTENTS (Continued)

Page

III THE DECISION BELOW IGNORES THE TRIBAL COURT PROCEEDINGS AND IS IN CONFLICT WITH RECENT DECISIONS OF THE NINTH CIRCUIT AND DECISIONS OF THIS COURT RECOGNIZING TRIBAL FORUMS AS APPROPRIATE FORUMS FOR THE EXCLUSIVE ADJUDICATION OF DISPUTES WITH NON-MEMBERS CONCERNING TRIBAL LANDS 13

A. Decisions of this Court Recognize the Inherent Authority of Indian Tribes to Exercise Civil Authority over Non-members 13

B. The Decision of the Ninth Circuit is in Conflict with the Decision in *Babbitt Ford, Inc. v. Navajo Indian Tribe* and the Decision of this Court in *Merrion v. Jicarilla Apache Tribe* 17

IV CONCLUSION 19

APPENDIX

A. Opinion of the United States Court of Appeals for the Ninth Circuit in *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072 (1983) A-1

B. Opinion of United States District Court for the District of Arizona in *Yavapai-Prescott Indian Tribe v. Watt*, 528 F.Supp. 695 (1981) B-1

TABLE OF CONTENTS (Continued)

Page

C. Opinion of the Interior Board of Indian Appeals in *Kuykendall v. Phoenix Area Director and Yavapai-Prescott Tribe*, 8 I.B.I.A. 76 (1980) C-1

D. Yavapai-Prescott Indian Tribe Law and Order Code, § 2.1, Jurisdiction D-1

TABLE OF AUTHORITIES CITED

Cases	Page
Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (1983)	7, *passim*
Board of County Comm'rs v. Seber, 318 U.S. 705 (1943)	9
Bryan v. Itasca County, 426 U.S. 373 (1976)	9
Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982) *cert. denied*, _____ U.S. _____, 103 S.Ct. 293 (1982)	7,14
Cowan v. Rosebud Sioux Tribe, 404 F. Supp. 1338, (1975)	14
Kuykendall v. Commissioner of Indian Affairs and Yavapai-Prescott Tribe, 9 I.B.I.A. 90	4
Kuykendall v. Phoenix Area Director, 8 I.B.I.A. 76 (1980)	15
Littell v. Nakai, 344 F.2d 486 (9th Cir. 1965)	15
McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973)	8
Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)	8, *passim*
Mescalaro Indian Tribe v. Jones, 411 U.S. 145 (1975)	7
Montana v. United States, 450 U.S. 544 (1981)	13,14,15
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)	8
Poafpybitty v. Skelly Oil Co. 390 U.S. 365 (1968)	9,12
Rockbridge v. Lincoln, 449 F.2d 567 (9th Cir. 1971)	9
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)	13,15
United States v. Blackfeet Tribal Court, 244 F. Supp. 474 (1975)	14

TABLE OF AUTHORITIES CITED (Continued)

Cases	Page
United States v. Kagama, 118 U.S. 375 (1886)	13
United States v. Mazurie, 419 U.S. 544 (1975)	8
United States v. Oregon, 657 F.2d 1009 (9th Cir. 1981)	16
United States v. Wheeler, 435 U.S. 313 (1978)	8,15
Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980)	7,8,9
White Mountain Apache Tribe v. Bracker, 488 U.S. 136 (1980)	7,9
Williams v. Lee, 358 U.S. 217 (1959)	14
Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)	8
Yavapai-Prescott Indian Tribe v. Watt, 528 F.Supp. 695 (1981)	2
Yavapai-Prescott Indian Tribe v. Watt, 707 F.2d 1072 (1983)	1,2,19

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Code

5 U.S.C. § 706(2)(A)(C)(D) 5

25 U.S.C. § 415 ..... 2, *passim*

25 U.S.C. § 1254(1) 2

25 U.S.C. § 1302 10

Code of Federal Regulations

25 C.F.R. § 11.22 11

25 C.F.R. § 162.14 3,4,5,6,9

Yavapai-Prescott Indian Tribe Law and Order Code § 2.1 4,15

OTHER MATERIALS

Opinions of the Solicitor, Vol. I 9,15

F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) 9,16

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Yavapai-Prescott Indian Tribe respectfully prays its Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on June 8, 1983.

The petitioner was a party to the Arizona appeal decided by the Ninth Circuit in *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072 (1983). The respondents to this Writ of Certiorari will be James G. Watt as Secretary of the Interior; the Interior Board of Indian Appeals of the United States Department of the Interior; Curtis Geiogamah, as Acting Area Director of the Phoenix Office of the Bureau of Indian Affairs; Curtis Nordwall as the Superintendent of the Trux-

ton Canyon Agency of the Bureau of Indian Affairs; and Marlin D. Kuykendall.

OPINIONS BELOW

The opinion of the Court of Appeals in *Yavapai-Prescott Indian Tribe v. Watt* is reported at 707 F.2d 1072 (1983) (App. A at 1-8). The opinion of the District Court is reported in *Yavapai-Prescott Indian Tribe v. Watt*, 528 F.Supp 695 (1981) (App. B at 1-6). The opinion of the Interior Board of Indian Appeals is reported at 8 I.B.I.A. 76 (App. C at 1-12).

JURISDICTION

The judgment of the Court of Appeals was entered on June 8, 1983 and this Petition for Certiorari was filed within 90 days of such date. This Court's jurisdiction is invoked under 25 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Code, Title 25 provides in pertinent part:

Section 415. Leases of restricted lands for public, religious, educational, recreational, residential, business and other purposes; approval by Secretary

Any restricted Indian lands, whether tribally or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes ... as determined by said Secretary. All leases so granted shall be for a term of not to exceed twenty-five years, except leases of land ... on the ... Yavapai-Prescott Community Reservation ... which may be for a term of not to exceed ninety-nine years.... Leases for public, religious, educational, recreational, residential, or business purposes ... may include provisions authorizing their renewal for one additional term of not to exceed twenty-five years, and all leases and renewals shall be

made under such terms and regulations as may be prescribed by the Secretary of the Interior.

2. Code of Federal Regulations, Title 25, Section 162.14 provides in part as follows:

> Upon a showing satisfactory to the Secretary that there has been a violation of the lease or the regulations in this part, the lessee shall be served with written notice setting forth in detail the nature of the alleged violation and allowing him ten days from the date of receipt of notice in which to show cause why the lease should not be cancelled. . . . If within the ten-day period, it is determined that the breach may be corrected and the lessee agrees to take the necessary corrective measures, he will be given an opportunity to carry out such measures and shall be given a reasonable time within which to take corrective action to cure the breach. If the lessee fails within such reasonable time to correct the breach or to furnish satisfactory reasons why the lease should not be cancelled, the lessee shall forthwith be notified in writing of the cancellation of the lease and demands shall be made for payment of all obligations and for possession of the premises.

STATEMENT OF THE CASE

The Secretary of the Interior, acting through the Bureau of Indian Affairs, approved a business lease of tribal lands between the respondent, Kuykendall, as lessee and the Yavapai-Prescott Indian Tribe, as lessor. The lease agreement provides that the lessee shall not sublease or transfer any interest in the lease or any improvements without the prior written approval of the lessor and the Secretary of the Interior, and that any such sublease, assignment or transfer shall constitute a breach of the lease agreement. The lease termination procedure in the lease approved by the Secre-

tary is contrary to the administrative lease procedure contained in the federal regulations. [1]

In January of 1979, without the knowledge or consent of the Tribe or the Secretary of the Interior, the respondent sold the Tribe's interest in the improvements and subleased the premises to a corporation known as Smith-Henkel Buick, Pontiac, GMC and Toyota, Inc., hereinafter called "Smith-Henkel". Thereafter, without the knowledge or approval of the Tribe the respondent delivered possession of the premises and improvements to the sublessees.

The Tribe notified Kuykendall that he was in default. He was given the 60-day notice prescribed by the lease agreement within which to cure the default by retaking possession. Respondent failed to cure the default and the Tribe terminated the lease.

The Tribe has a comprehensive Law and Order Code [2] which vests in the Yavapai-Prescott Tribal Court exclusive jurisdiction of all suits involving users of tribal land. (App. D). The sublessee, Smith-Henkel, filed an action in the Tribal Court for declaratory judgment against respondent and the Tribe, to obtain an adjudication as to the validity of the lease termination by the Tribe. The Tribe agreed to litigate the matter in the Tribal Court. Personal service of the complaint for declaratory relief was made by Smith-Henkel upon

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[1] Paragraph 30 of the lease states that in the event of a default in any covenant of the lease, which continues uncured for a period of sixty days after notice in writing by *either* the Tribe *or* the Secretary of the Interior, *either* the Tribe *or* the Secretary may re-enter the premises and terminate the lease. On the other hand, 25 C.F.R. § 162.14 provides that upon a "showing satisfactory to the Secretary" of a lease violation, the lessee is served with a notice to show cause in 10 days why the lease should not be cancelled. If the breach can be corrected and the lessee agrees to correct, he has a "reasonable time" to cure the breach.

[2] The sovereign authority of the Tribe to adopt the Tribal Law and Order Code was upheld by the Interior Board of Indian Appeals in *Kuykendall v. Commissioner of Indian Affairs and Yavapai-Prescott Tribe*, 9 I.B.I.A. 90.

the respondent, who refused to appear, and a contested trial on the merits between the Tribe and Smith-Henkel was held on December 9, 1979. The 215 page transcript is part of the record in the Court of Appeals. Administrative Record No. 34, Transcript of Tribal Court Proceedings. A judgment was entered on February 1, 1980, declaring the interest of respondent and Smith-Henkel in the lease terminated for breach of the lease agreement. No appeal was taken to the Tribal Court of Appeals, and the judgment is final.

In August of 1979, respondent requested the Area Director of the Bureau of Indian Affairs to intervene to prevent the Tribe from cancelling the lease. The Area Director refused to intervene, ruling that the Tribe had the authority to cancel the lease. An administrative appeal was taken by Kuykendall. The Interior Board of Indian Appeals ruled that an Indian tribe could not terminate a business lease without Secretarial approval and the Tribal Court had no "subject matter jurisdiction" over the lease dispute between the Tribe and a non-member lessee doing business on the reservation. (App. C at 4, 11).

The Tribe filed a complaint on June 17, 1980 in the District Court of Arizona, seeking review of the administrative decision. The complaint challenged the legal conclusions of the Board as unlawful pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (C) and (D).

By its decision dated December 21, 1981, the District Court ruled that 25 C.F.R. § 162.14 did not establish an exclusive method for cancelling an Indian lease and there was nothing in the regulations or in the lease indicating that the Tribe did not have the power to terminate the lease. (App. B at 4-6).

The case was appealed to the Court of Appeals for the Ninth Circuit, which rendered its decision on June 8, 1983. The Court of Appeals viewed the issue to be "whether recognizing a power in a tribe to terminate unilaterally a commercial lease will enhance the profitable development of

Indian land." (App. A at 5). It noted that it was difficult to determine how the balance should be struck between "the risk of improvidence and the enhancement of tribal power." (App. A at 6). The Court chose to restrict tribal power and held that Indian tribes have no power to terminate leases of tribal lands without approval of the Secretary of the Interior acting through the Bureau of Indian Affairs.

REASONS FOR GRANTING WRIT

I

THE NINTH CIRCUIT DECISION AFFECTS ALL INDIAN TRIBES BY SIGNALLING AN END TO THE POLICY OF ENCOURAGEMENT OF TRIBAL SELF-GOVERNMENT AND THE STIMULATION OF INDIAN ECONOMIC AND COMMERCIAL DEVELOPMENT.

The issue presented to the Court of Appeals was whether business leases granted by the Indian owners of tribal land pursuant to 25 U.S.C. § 415(a) may be terminated by tribal owners pursuant to termination provisions in the lease. The Court of Appeals ignored the tribal court litigation and held that as a matter of policy all Indian lease terminations must be conducted in accordance with the provisions of 25 C.F.R. § 162.14, notwithstanding lease termination language negotiated by the Tribe, agreed to by the lessee and approved by the Secretary of the Interior.[3] The principle announced by the Court of Appeals is in conflict with recent decisions of the Ninth Circuit upholding the exercise of tribal civil juris-

[3] 25 U.S.C. § 415 gives to the Indian owners the power to lease tribal lands upon terms and conditions approved by the Secretary of the Interior. The statute contains no limitation upon the power of a tribe to *terminate* a Secretarially approved lease in accordance with its terms, although the Ninth Circuit found that such was the intent of Congress.

diction over non-members [4] and contrary to the strong and often cited Congressional policy of encouraging tribal self-government. [5] The decision has a profound effect upon the future self-determination of all Indian tribes. Divesting Indian tribes of the right to litigate lease disputes involving tribal lands with non-members in tribal courts under tribal codes does not foster tribal self-government. By the same token, the policy of placing in the Bureau of Indian Affairs the right to approve or to withhold approval, as the case may be, of an Indian tribe's efforts to vindicate its rights under Secretarially approved leases of tribal lands will not return the initiative destroyed by a century of paternalism. [6] Such policy can only result in increased dependence upon the federal government through relinquishment by Indian tribes of control over their business and commercial affairs.

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[4] *See Cardin v. De La Cruz*, 671 F.2d 363 (9th Cir. 1982), *cert. denied*, _____ U.S. _____, 103 S.Ct. 293 (1982) (Civil tribal court jurisdiction upheld over non-members on fee lands within the reservation); *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983) (Tribal court jurisdiction upheld over non-Indians repossessing automobiles on reservation).

[5] *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 149 (1980) (There is a "general federal policy of encouraging tribes 'to revitalize their self-government' and to assume control over their 'business and commercial affairs.' ") (*quoting Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973)). *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155 (1980) ("The federal statutes. . . . evidence . . . a congressional concern with fostering tribal self-government and economic development.")

[6] *See Mescalaro Indian Tribe v. Jones*, 411 U.S. 145, 152 (1973).

II

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT UPHOLDING TRIBAL SOVEREIGNTY AND THE POWER OF INDIAN LESSEES TO VINDICATE THEIR RIGHTS UNDER LEASES OF INDIAN LAND.

A. *The Ninth Circuit's decision is in conflict with concepts of tribal sovereignty announced by this Court.*

It has long been recognized that Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832). They retain those powers of self-government not voluntarily relinquished by treaty, not divested by Congress in the exercise of its plenary authority over them, or not inconsistent with the superior interest of the United States as a sovereign nation. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208-09 (1978); *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

Most recently, this Court has upheld the authority of an Indian tribe to impose taxes on non-Indians doing business on the reservation. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). In *Merrion* this Court held that the power to tax "is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." *Id.* at 137.

It has also been said by this Court that statutes and regulations dealing with Indians must be read against the backdrop of Indian sovereignty. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973). When 25 U.S.C. § 415 is read in light of the above pronouncements of this Court, it is clear that there is no limitation upon the authority of an Indian tribe to *terminate* a lease and no grant of authority to the Secretary to manage tribal lands or approve lease terminations. In fact, the statute contains no

language at all which is applicable to the termination of leases. The statute recognizes the sovereign authority of "tribal owners" of Indian lands to lease such lands with the approval of the Secretary, upon terms and conditions he may prescribe. It has long been held by the Department of the Interior that the primary right under the leasing statutes is in the tribe and not the Secretary of the Interior. *See* Vol. I, *Opinions of the Solicitor*, United States Department of the Interior, at 470. *See also Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968).

While the Ninth Circuit recognizes that 25 C.F.R. § 162.14 "does not expressly require that its procedures be followed when a lease approved by the Secretary is terminated" (App. A at 5), it opined that the intent of Congress in the enactment of 25 U.S.C. § 415 was to prevent tribes from terminating leases without resort to the administrative process. The Court found the issue to be one of economics, that is, whether "recognizing a power in a tribe to terminate unilaterally a commercial lease will enhance the profitable development of Indian land." (App. A at 5). This view is simplistic, to say the least. First, the purpose of placing Indian lands in trust is to "safeguard Indian land and at the same time 'to prepare the Indians to take their place as independent, qualified members of a modern body politic.'" *Poafpybitty v. Skelly Oil Co.*, 390 U.S. at 369 (*quoting Board of County Comm'rs v. Seber*, 318 U.S. 705, 715). The Ninth Circuit decision fails to recognize that the policy of fostering tribal self-government is also an important federal concern. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). Second, if there is a legitimate question whether 25 U.S.C. § 415 applies to lease terminations (and there is not), the Ninth Circuit was required to construe the statute liberally, in favor of establishing Indian rights. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971); F. Cohen, *Handbook of Federal Indian Law* 224 (1982 ed.). This the Ninth Circuit did not do.

The Court of Appeals goes on to say that there is no simple and unqualified answer, but by granting the Tribe the right to terminate leases "tribes would have greater power to eliminate the unfavorable aspects of commercial leases.... [but] [o]n the other hand, elimination of the Secretary's approval also increases the risk of there being lease terms not consistent with the long-run interests of the tribes." (App. A at 6). The meaning of the Ninth Circuit's reference to "[the tribe's] power to eliminate the unfavorable aspects of commercial leases" is obscure. If by that phrase the Court meant the tribe's power to eliminate unacceptable performance by tenants, then recognizing the right of an Indian tribe to terminate a lease in accordance with its terms, without Secretarial approval, will surely give tribes greater power than they would have if Secretarial approval of lease terminations was required. This result is entirely consistent with federal concepts of tribal sovereignty, self-government and economic development. However, if the Ninth Circuit intended to refer to the power of the tribe to arbitrarily eliminate the terms, covenants and conditions of a Secretarially approved lease, that power is subject to constraints which the Court of Appeals failed to acknowledge. As this Court has previously noted with regard to the tribal power to tax, the power of the federal government to take away the tribe's power is a restraint which minimizes the potential concern that Indian tribes will exercise the power unfairly and "ensure[s] that any exercise of ... tribal power ... will be consistent with national policies". *Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 141. If the Ninth Circuit assumed that tribal governments would not operate in accordance with due process of law in terminating leases of tribal land, the Indian Civil Rights Act, 25 U.S.C. § 1302 is the answer. It provides constitutional protections to those who are subject to the tribe's jurisdiction, to prevent the tribe from eliminating the unfavorable aspects of commercial leases.

The Ninth Circuit's fear that "elimination of the Secretary's approval [of lease terminations] also increases the risk of there being lease terms not consistent with the

long-run interests of the tribes" (App. A at 6) is totally unfounded. Any lease of tribal land is a result of negotiation of lease terms by the Indian owners with the prospective tenant and the approval of such terms by the Secretary of the Interior. If the Secretary carries out his duties under 25 U.S.C. § 415, there can be no lease terms which are not consistent with the long term interests of the Tribe. If the tenant fails to comply with such terms and conditions the lease may be terminated. After termination, the process begins anew with the negotiation of lease terms and Secretarial approval before the grant of a new lease. Eliminating the requirement of Secretarial approval of lease *terminations* cannot, in the nature of things, result in any increased risk of lease terms not being in the best interests of the Tribe. The sequence of events simply does not permit that result — if there were any risk of unfavorable lease terms, that risk arises out of the leasing process prescribed in 25 U.S.C. § 415 and not out of the process of enforcing the lease terms or terminating the lease with a tenant whose performance proves to be unacceptable.

It should be emphasized that the case at bar involves no challenge to the Secretary's right to approve leases under 25 U.S.C. § 415. The Secretary presumably will not approve "lease terms not consistent with the long-run interests of the tribes" and the Secretary will remain on constant guard in connection with all lease approvals, whether the Secretary does or does not have the authority to approve lease terminations. Thus, because of the Secretary's approval power over all leases of Indian land, recognition of the power of an Indian tribe to *terminate* a lease in accordance with its terms simply does not increase the risk of lease terms in a

new lease not consistent with the tribe's long term interests. [7]

B. *The Ninth Circuit's Decision Conflicts With This Court's Decision in Poafpybitty v. Skelly Oil Company.*

Poafpybitty v. Skelly Oil Co. stands for the proposition that "federal restrictions preventing the Indian from selling or leasing his allotted land without the consent of a government official do not prevent the Indian land owner . . . from maintaining suits appropriate to the protection of his rights." 390 U.S. at 372.

The decision also notes that the existence of the power in the United States to sue upon a violation of an Indian lease "no more diminishes the right of the Indian to maintain an action to protect that lease than the general power of the United States to safeguard an allotment affected the capacity of the Indian to protect that allotment." *Id.* at 373-74. While the issue of the cancellation of an Indian lease was not before this Court in *Poafpybitty*, the case at bar represents a stronger case for application of the principle that "there is nothing in the lease or regulations requiring the Indians to seek administrative action . . . instead of instituting legal proceedings on their own." *Id.* at 373. Here the lease which was approved by the Secretary of the Interior *expressly* gives the Tribe *or* the Secretary the right to terminate the lease in accordance with its terms.

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[7] The same reasoning applies to the Court of Appeal's statement that to recognize the power in the Tribe to terminate "would create the possibility of an impasse between the Secretary and a unilaterally terminating tribe" because "[T]he Tribe could insist upon new terms in any new lease which the Secretary might not be inclined to approve." (App. A at 7). The Ninth Circuit has confused the concept of "leasing" under 25 U.S.C. § 415 with the termination of leases, which has nothing to do with 25 U.S.C. § 415. If it is assumed *arguendo* that the risk of an impasse between a tribe and the Secretary exists in every instance in which tribal lands are leased by the Indian owners under 25 U.S.C. § 415, that risk exists whether or not the tribe has the power to *terminate* a lease. This has been the case since the statute was enacted, and is not affected one way or the other by the present controversy.

The Ninth Circuit's decision that an Indian tribe cannot terminate a Secretarially approved lease of tribal lands in accordance with its terms, is clearly in conflict with the principles announced by this Court in the *Poafpybitty* case.

III

THE DECISION BELOW IGNORES THE TRIBAL COURT PROCEEDINGS AND IS IN CONFLICT WITH RECENT DECISIONS OF THE NINTH CIRCUIT AND DECISIONS OF THIS COURT RECOGNIZING TRIBAL FORUMS AS APPROPRIATE FORUMS FOR THE EXCLUSIVE ADJUDICATION OF DISPUTES WITH NON-MEMBERS CONCERNING TRIBAL LANDS.

A. *Decisions of this Court recognize the inherent authority of Indian tribes to exercise civil authority over non-members.*

While Indian tribes are "no longer 'possessed of the full attributes of sovereignty', they remain a 'separate people, with the power of regulating their internal and social relations'.... [with the] power to make their own substantive law in internal matters ... and to enforce that law in their own forums." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (*quoting United States v. Kagama*, 118 U.S. 375, 381-82) (citations omitted).

Indian tribes also retain the inherent sovereign power to exercise certain forms of civil jurisdiction over non-Indians on their reservations, and an Indian tribe has the right to regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana v. United States*, 450 U.S. 544, 565 (1981) (citations omitted). This Court has repeatedly recognized tribal courts as "appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara*, 436 U.S. at 65 (footnote and citations omitted). The power to exercise tribal civil authority over non-Indians derives not only

from the inherent powers necessary to self-government and territorial management but also from the power to exclude non-members from tribal land. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. at 142-43. Non-members who have entered tribal lands pursuant to contract with the tribe nonetheless remain "subject to the tribe's *power* to exclude them" *Id.* at 144. (emphasis in opinion). The tribe has the power to "place conditions on entry, on continued presence, or on reservation conduct" and non-members who enter the jurisdiction of the tribe remain "subject to the risk that the tribe will later exercise its sovereign power". *Id.* at 144-45.

In *Williams v. Lee*, 358 U.S. 217 (1959), this Court held that there could be no doubt that the exercise of state jurisdiction in a dispute between a non-Indian trader and an Indian over goods purchased by an Indian on the reservation "would undermine the authority of the tribal courts over Reservation affairs" thereby infringing on the Indians' right to govern themselves. *Id.* at 223. It was "immaterial" that the plaintiff was a non-Indian because he was on the reservation and the transaction took place there. *Id.*

The Ninth Circuit has recognized the inherent sovereignty of an Indian tribe to exercise civil jurisdiction over non-members in tribal courts. *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 598 (9th Cir. 1983) ("Civil jurisdiction to enforce [tribal regulations governing repossessions on the reservation by non-members] is a necessary exercise of tribal self-government and territorial management."); *Cardin v. De La Cruz*, 671 F.2d 363, 366 (9th Cir. 1982), *cert. denied*, _____ U.S. _____, 103 S.Ct. 293 (Tribe can regulate the activities of nonmembers who enter consensual commercial relationships with the tribe). *See also Cowan v. Rosebud Sioux Tribe*, 404 F.Supp. 1338, 1341 (S.D. 1975) (in a lease dispute with a non-Indian "the regulation of tribal property would seem to be one of the vestiges of tribal sovereignty and thus a matter of tribal self-government."); *United States v. Blackfeet Tribal Court*, 244 F.Supp. 474, 477 (D. Mont. 1965) (an order of the tribal

court banishing lessees of tribal lands held within the authority of the tribe and its right " 'to regulate the handling of and exercise control in disputes over property and property rights' ") (*quoting Littell v. Nakai*, 344 F.2d 486 (9th Cir. 1965).

The Yavapai-Prescott Indian Tribe's Law and Order Code (App. D) provides for exclusive jurisdiction of the tribal court in all disputes between the Tribe and non-members involving leases of tribal lands. Under the authority of the decisions cited *supra*, the tribal court had jurisdiction over the lease dispute involving the Tribe, the respondent and the sublessee, Smith-Henkel as "a necessary exercise of tribal self-government and territorial management." *Babbitt Ford*, 710 F.2d at 598. [8]

In the case at bar the Court of Appeals was influenced in its decision by the consideration that possession by the Tribe of a power to terminate a Secretarially approved lease upon terms and conditions agreed to by the parties would "tend to depress the value of the lease", (App. A at 7), because the lessee would have no administrative remedy and the "sovereign immunity of the tribes bars relief against the

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[8] The Interior Board of Indian Appeals held that the tribal court had no "subject matter jurisdiction". *Kuykendall v. Phoenix Area Director*, 8 I.B.I.A. 76, 87-88 (1980). Not only did the Interior Board of Indian Appeals fail to heed the pronouncements of this Court in *Santa Clara Pueblo v. Martinez* and *Montana v. United States* but it ignored the Code of Federal Regulations. *See* 25 C.F.R. § 11.22 which provides for subject matter jurisdiction in the court of Indian offenses of all suits wherein the defendant is a member of the tribe and of all other suits between members and non-members which are brought before the court by stipulation of the parties. It has been said that courts of Indian offenses derived their authority from the tribe rather than from Washington, Vol. I, *Opinions of the Solicitor*, at page 476. *See also United States v. Wheeler*, 435 U.S. 313 (1978). Such being the case, the conclusion of the Board that the tribal court had no subject matter jurisdiction is clearly wrong.

Tribe". *Id.*[9] In *Merrion*, the concern that an Indian tribe would exercise the power to tax in an "unfair or unprincipled manner", 455 U.S. at 141, was minimized by the fact that Secretarial approval of the ordinance was required and, in addition, Congress could take away the power to tax. Furthermore, in *Babbitt Ford, Inc. v. Navajo Indian Tribe*, decided just two months after the case at bar, the Ninth Circuit found that Secretarial approval and the federal government's "ultimate power to take away a Tribe's power ... [were] constraints that 'minimize [the] potential concern that Indian tribes will exercise the power ... [unfairly].' " 710 F.2d at 599 (*quoting Merrion*, 455 U.S. 130, 141). The Ninth Circuit also noted that the Indian Civil Rights Act was a constraint which "grants constitutional protections to those who are subject to the tribe's jurisdiction." *Id.* Here, the constraints which were present in *Merrion* and in *Babbitt* are also present to minimize any risk that Indian tribes will unfairly exercise the right to terminate Secretarially approved leases in accordance with their terms. There is no difference in principle between recognizing the sovereignty of an Indian tribe to pass a tribal severance tax ordinance which taxes non-members *(Merrion)* and the passage of an ordinance to regulate repossessions by non-members on the reservation *(Babbitt Ford)* and recognizing the sovereignty of the tribal court to litigate the validity of a lease termination between a non-Indian lessee and the tribe. Finally, it should be noted that not only are all the constraints present in

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[9] The Ninth Circuit failed to recognize that it has previously held that an Indian tribe can waive its sovereign immunity by intervening and agreeing to be bound by a declaratory judgment action. *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981). In the case at bar the Tribe answered the declaratory judgment action filed in the tribal court by Smith-Henkel, and *agreed* to be bound by the judgment of the tribal court. Administrative Record No. 34, Transcript of Tribal Court Proceedings. While this Court has not settled the issue, it has been said that because tribes retain all power not taken by treaty or by statute or not implicitly lost by virtue of their status, they retain the inherent authority to waive their immunity to suit in tribal courts. *See* F. Cohen, *Handbook of Federal Indian Law* 325 (1982 ed.).

Merrion and *Babbitt Ford*, present here, but the case at bar represents a stronger case for upholding tribal sovereignty than in those cases, because here the respondent lessee had a choice as to whether he would enter into a lease agreement with the Tribe. He chose to agree to terms which give *either* the Secretary *or* the Tribe the right to terminate the lease. [10] While arguably the non-Indians in *Merrion* and *Babbitt* had a choice as to whether they would come onto the reservation, there was no choice as to the passage of the tribal legislation which regulated the non-Indian. [11]

B. *The Decision of the Ninth Circuit is in Conflict with the Decision in Babbitt Ford, Inc. v. Navajo Indian Tribe and the Decision of this Court in Merrion v. Jicarilla Apache Tribe.*

The Ninth Circuit's consideration that "[P]ossession by a tribe of a unilateral power to terminate will tend to depress the value of the lease" because lessees of Indian tribal lands would not be able to proceed against the tribe or invoke an administrative remedy (App. A at 7), is in conflict with the decision of the Court in *Babbitt Ford, Inc. v. Navajo Indian Tribe*. *Babbitt Ford* involves the issue as to whether an Indian tribe retains inherent sovereign power to exercise civil jurisdiction over non-Indians on the reservation. The Court held that the tribe could enforce its ordinance relating to the repossession of motor vehicles on the reservation against non-members in the tribal court. The Ninth Circuit upheld the sovereignty of the Navajo Tribe to exercise civil jurisdiction over non-members, even though the tribe was immune from suit and there was no administrative remedy in the

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[10] It should be noted that the respondent agreed to be bound by "all laws, regulations and ordinances of the Yavapai-Prescott Reservation now in force and effect or that may be hereafter in force and effect . . ." (Administrative Record No. 31; Lease, para. 39).

[11] However, this Court also noted in *Merrion* that consent of the lessee to the tribe's power to tax was not required because consent has "little if any role in measuring the validity of an exercise of legitimate sovereign authority." 455 U.S. at 147.

non-member lessee to attack the ordinance in question. The Court noted that there were a number of constraints upon tribal action, including Secretarial approval of the ordinance, the power of Congress to take away the power of the tribe to regulate repossessions conducted on reservation land and the due process guarantees contained in the Indian Civil Rights Act. 710 F.2d at 598-99. While the same constraints were present in the case at bar, the Ninth Circuit attempted to restrict the sovereignty of the Tribe on the questionable theory that the lack of a remedy in the lessee would result in depressing the value of the lease. This is in conflict with the ruling in *Babbitt Ford* and also with this Court's ruling in *Merrion v. Jicarilla Apache Tribe*. The tribal ordinance in *Merrion* was an ordinance imposing a severance tax upon non-members doing business on the reservation. If this Court had applied the reasoning of the Ninth Circuit in the case at bar to the *Merrion* case, the result would have been to strike down the Navajo Tribe's sovereignty to pass such a severance tax on the theory that the nonmembers would not be able to proceed against the tribe [because of sovereign immunity] or invoke an administrative remedy. However, this Court in *Merrion* found such consideration not to be persuasive. *See* p. 16 *infra*.

As previously noted, the Ninth Circuit's decision fails to recognize the constraints that this Court found in *Merrion* and, in addition, fails to concede the existence of the constitutional restraints upon tribal action found in the Indian Civil Rights Act. All these constraints are present in connection with any Indian tribe's power to terminate a lease of tribal land in accordance with its terms, and the sovereign immunity of the tribe is not a basis for restricting application of the doctrine of tribal sovereignty.

IV
CONCLUSION

The Ninth Circuit decision striking down the power of an Indian tribe to vindicate its rights under Secretarially approved leases of tribal lands is in conflict with the federal policy of tribal self-government and economic development. Placing the right to approve or withhold approval of lease terminations in the Bureau of Indian Affairs can only result in continued domination of Indian government, business and commercial affairs.

The jurisdiction of the tribal court over lease disputes with non-members and the conflict between the case at bar and the principles announced by this Court in *Merrion v. Jicarilla Apache Tribe* and the Ninth Circuit in *Babbitt Ford, Inc. v. Navajo Indian Tribe*, both upholding the exercise of tribal sovereignty over non-members, should be addressed and definitively resolved by this Court. This Court should issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review, and to reverse summarily the decision in *Yavapai-Prescott Indian Tribe v. Watt*.

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September 1983

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

TABLE OF CONTENTS

		Page
Appendix A	Opinion of the United States Court of Appeals for the Ninth Circuit in *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072 (1983)	A-1
Appendix B	Opinion of the United States District Court for the District of Arizona in *Yavapai-Prescott Indian Tribe v. Watt*, 528 F.Supp. 695 (1981)	B-1
Appendix C	Opinion of the Interior Board of Indian Appeals in *Kuykendall v. Phoenix Area Director and Yavapai-Prescott Tribe*, 8 I.B.I.A. 76 (1980)	C-1
Appendix D	Yavapai-Prescott Indian Tribe Law and Order Code, § 2.1, Jurisdiction	D-1

APPENDIX A

YAVAPAI-PRESCOTT INDIAN TRIBE,
Plaintiff/Counterdefendant/Appellee,

v.

JAMES G. WATT, as Secretary of the Interior, et al., Defendants,

and

MARLIN D. KUYKENDALL, an individual,
Defendant/Counterclaimant/Appellant.

No. 82-5405.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 12, 1983.

Decided June 8, 1983.

Reversed and remanded.

Appeal from the United States District Court for the District of Arizona.

Before DUNIWAY, GOODWIN and SNEED, Circuit Judges.

SNEED, Circuit Judge:

Federal law requires the approval of the Secretary of the Interior before certain Indian lands can be leased. This case raises the question whether an Indian Tribe has the authority to terminate a lease executed in accordance with this law without obtaining the Secretary's approval for the lease termination. The district court held that a tribe has that authority. We disagree and reverse the judgment of the district court and remand for further proceedings as are consistent with this opinion.

I.
FACTS

On September 11, 1969, the Yavapai-Prescott Indian Tribe leased a tract of land in Prescott, Arizona to appellant Marlin D. Kuykendall for use as an automobile dealership. The term of the lease was for 25 years with an option to renew for an additional 25 years.

The Tribe obtained the approval of the Secretary of the Interior for the lease pursuant to 25 U.S.C. § 415, authorizing commercial leases of Indian lands, as implemented by 25 C.F.R. §§ 162.1-162.20. [1] That statute requires that any lease of certain Indian lands be approved by the Secretary, and "be made under such terms and regulations as may be prescribed by the Secretary." [2]

One of the implementing regulations, 25 C.F.R. § 162.14, establishes procedures, in the event of a breach of a lease agreement, for the Secretary to participate in the cancella-

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[1] These regulations were previously designated 25 C.F.R. §§ 131.1-131.20.

[2] 25 U.S.C. § 415 provides, in part, that:

Any restricted Indian lands, . . . tribally . . . owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for . . . business purposes, . . . as determined by said Secretary. All leases so granted shall be for a term of not to exceed twenty-five years, except leases of land . . . on the . . . Yavapai-Prescott Community Reservation . . . which may be for a term of not to exceed ninety-nine years . . . Leases for . . . business purposes . . . may include provisions authorizing their renewal for one additional term of not to exceed twenty-five years, and all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior.

tion of the lease.[3] Despite the requirements of this regulation, article 30 of the lease — providing remedies to the Tribe in the event of Kuykendall's default on his lease obligations — states that the Tribe "and/or" the Secretary may terminate the lease.

In March of 1979, Kuykendall arranged to sublet the land and sell his dealership to a partnership. The Tribe disapproved of the sublease and notified Kuykendall that the sublease was a breach of the lease agreement. On June 27, 1979, the Tribe terminated the lease without the Secretary's approval.

Following termination of the lease, Kuykendall sought assistance from the Area Director of the Bureau of Indian Affairs. Kuykendall claimed that the Tribe was precluded from cancelling the lease without first obtaining the approval of the Secretary of the Interior. The Area Director, however, upheld the Tribe's authority to terminate the lease unilaterally.

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[3] 25 C.F.R. § 162.14 states, in part:

Upon a showing satisfactory to the Secretary that there has been a violation of the lease or the regulations in this part, the lessee shall be served with written notice setting forth in detail the nature of the alleged violation and allowing him ten days from the date of receipt of notice in which to show cause why the lease should not be cancelled. The surety or sureties shall be sent a copy of each such notice. If within the ten-day period, it is determined that the breach may be corrected and the lessee agrees to take the necessary corrective measures, he will be given an opportunity to carry out such measures and shall be given a reasonable time within which to take corrective action to cure the breach. If the lessee fails within such reasonable time to correct the breach or to furnish satisfactory reasons why the lease should not be cancelled, the lessee shall forthwith be notified in writing of the cancellation of the lease and demands shall be made for payment of all obligations and for possession of the premises. The notice of cancellation shall inform the lessee of his right to appeal pursuant to Part 2 of this chapter. Where breach of contract can be satisfied by the payment of damages, the Secretary may approve the damage settlement between the parties to the lease, or where the Secretary has granted the lease, he may accept the damage settlement.

Kuykendall filed an administrative appeal with the Interior Board of Indian Appeals. The Board held that the Secretary owes a fiduciary duty to the Tribe under 25 U.S.C. § 415 in administering the lease, and that neither the language of the lease nor the conduct of the parties indicates an intent to end the Secretary's fiduciary duty in the event of Kuykendall's default on the lease. The Board explained that the statutory duty, as interpreted by the regulations, could not be abrogated merely by the approval of a lease containing a provision to the contrary. The Board concluded that 25 C.F.R. § 162.14, promulgated pursuant to 25 U.S.C. § 415, and requiring Secretarial involvement in lease cancellations, provides the exclusive method by which the Tribe can terminate a lease. The Board then set aside the determination of the Area Director and reinstated the lease subject to a decision by the Area Director on the merits of the lease cancellation.

The Tribe filed this action in the district court pursuant to the Administrative Procedure Act, for review of and relief from the Board's decision. Kuykendall counterclaimed, seeking declaratory and monetary relief on the merits.

The district court held that the Tribe could cancel a lease without the Secretary's approval. The court pointed out that 25 C.F.R. § 162.14 does not state expressly that it provides the exclusive procedure for cancellation of a lease of Indian land. The district court then determined that since the Secretary had approved the lease, including article 30, the Tribe could enforce its unilateral cancellation. The district court therefore reversed the decision of the Board, 528 F.Supp. 695, and subsequently dismissed Kuykendall's counterclaim

without comment. For the reasons set forth below, we reverse the district court and reinstate the Board's decision. [4]

II.
ANALYSIS

While 25 C.F.R. § 162.14 does not expressly require that its procedures be followed when a lease approved by the Secretary is terminated, *see* note 3 *supra*, a literal reading of the regulation is not enough. Whether the remedies provided in the regulation are exclusive must be determined in light of the intent of Congress in enacting the statute which the regulation purports to implement. *See Loma Linda University v. Schweiker*, 705 F.2d 1123, 1126 (9th Cir. 1983); *see also Griggs v. Duke Power Co.*, 401 U.S. 424, 434, 91 S.Ct. 849, 855, 28 L.Ed.2d 158 (1971).

Congress adopted section 415 to encourage long-term commercial leases of Indian land and thereby to enhance its profitable development. H.R.Rep. No. 1093, 84th Cong., 1st Sess. 1, *reprinted in* 1955 U.S. Code Cong. & Admin.News 2691. Since the enactment of section 415, business leases have become, as Congress hoped, an important source of income for Indians, and can be called the "cornerstone of a reservation economic development program." Chambers & Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 Stan.L.Rev. 1061, 1063 (1974). The issue, when viewed in the light of this congressional purpose, becomes whether recognizing a power in a tribe to terminate unilaterally a commercial lease will enhance the profitable development of Indian land.

A simple and unqualified answer does not exist. Recognition of such power would increase the economic power of the tribes with respect to unfavorable commercial

[4] Kuykendall also appeals the dismissal of his amended counterclaims, one of which seeks a declaratory judgment that even if the Tribe were to have the authority to cancel the lease, its attempt to do so here would be ineffective. Since we hold that the Tribe does not have the authority to cancel the lease unilaterally, we do not reach these issues, but leave them for the consideration of the appropriate forum on remand.

leases. By termination, when permitted by the lease terms, or its threat, tribes would have greater power to eliminate the unfavorable aspects of commercial leases. No longer would the exercise of this power be subject to approval of the Secretary.

On the other hand, elimination of the Secretary's approval also increases the risk of there being lease terms not consistent with the long-run interests of the tribes. The magnitude of this risk is impossible to measure, but the enactment of 25 U.S.C. § 415 attests that Congress believed it existed. 25 C.F.R § 162.14 indicates that the Secretary quite properly also believes it exists.

It is difficult to be certain about how the balance should be struck between the risk of improvidence and the enhancement of tribal power. However, we choose to reduce the risk — a cautious approach admittedly. To some extent our level of anxiety is less than it otherwise might be because, whatever our choice, it lies within the power of the Secretary to set aside our choice at least with respect to the future. Were we to enhance tribal power by recognizing under the circumstances of this case the power of the Tribe to terminate the lease unilaterally, it is likely that the Secretary could nullify the effect of our decision by henceforth approving only leases that required his approval for termination. On the other hand, following our decision in this case the Secretary could abandon his position by changing the regulation to recognize to the extent desired the unilateral power of a tribe to terminate a commercial lease. We believe it is more consistent with the judicial process to accept the Secretary's present choice with respect to the proper balance between enhanced tribal power and increased risks of improvidence and to leave to that office the task of altering that choice. *See Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965); *Southern Pacific Transportation Co. v. Watt*, 700 F.2d 550, 552 (9th Cir. 1983).

Two additional considerations have influenced our decision. The first of these is that to recognize the power the Tribe here asserts would create the possibility of an impasse between the Secretary and a unilaterally terminating tribe. The Tribe could insist upon new terms in any new lease which the Secretary might not be inclined to approve. This possibility is eliminated by the course we have chosen. It is revealing that here the Tribe argues that the Secretary must approve any lease that is beneficial to the Tribe following termination.

The second consideration is that possession by a tribe of a unilateral power to terminate will tend to depress the value of the lease to the lessee and discourage the erection of substantial improvements on the leasehold. This could reduce the return to tribes from long-term commercial leases. Lessees confronted with tribal termination would not be able to proceed against the Tribe or invoke an administrative remedy. The Secretary's assumed lack of authority over terminations eliminates the administrative remedy while the sovereign immunity of the tribes bars relief against the Tribe. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978); *Ramey Construction Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 320 n. 5 (10th Cir.1982); *see also Colliflower v. Garland*, 342 F.2d 369 (9th Cir.1965); O. Olney & D. Getches, Indian Courts and the Future (1978). It is doubtful that lessees will be able to purchase sufficient immunity from terminations to enable the tribes, in a sense, "to capitalize" the value of their termination power by insisting upon a lease bonus as the price of its surrender. Should this be true it is likely that commercial leases will yield a lower return to the tribes.

Finally, we are not persuaded to abandon our cautious approach merely because the lease before us states the Tribe "and/or" the Secretary may terminate the lease. The Secretary did not read this clause as the Tribe suggests, nor do

we.[5] The issue before us is too important to permit it to turn on what is at best an awkward, albeit sometimes useful, expression.

REVERSED and REMANDED.

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[5] The Tribe argues here that, by approving the lease with Kuykendall, including article 30, the Secretary authorized suspension of the procedures required by 25 C.F.R. § 162.14. We disagree. Even assuming that the Secretary tacitly approved such a suspension — which did not occur — an agency normally is bound by its own regulations. *Vitarelli v. Seaton*, 359 U.S. 535, 539, 79 S.Ct. 968, 972, 3 L.Ed.2d 1012 (1959). Moreover, even if the Secretary or an agent empowered by him could suspend this regulation, the lease at issue here was approved not by the Secretary, but by the Superintendent of the Truxton Canyon Agency of the Bureau of Indian Affairs, who has no such power. The cases on which the Tribe relies, *see Chisholm v. House*, 160 F.2d 632, 642 (10th Cir.1947); *Hallam v. Commerce Mining and Royalty Co.*, 49 F.2d 103, 108 (10th Cir.), *cert. denied*, 284 U.S. 643, 52 S.Ct. 23, 76 L.Ed. 547 (1931); *Whitebird v. Eagle-Picher Co.*, 258 F.Supp. 308, 311 (N.D. Okl.1966), *aff'd on other grounds*, 390 F.2d 831 (10th Cir.1968), involve express Secretarial approval for a suspension of Department of Interior regulations. There was no similar approval here.

APPENDIX B

YAVAPAI-PRESCOTT INDIAN TRIBE,
Petitioner,

v.

JAMES G. WATT, as Secretary of the Interior, et al., Respondents.

No. CIV 80-464 PCT CLH.

United States District Court,
D. Arizona

Dec. 21, 1981.

Reversed.

MEMORANDUM OPINION AND ORDER

HARDY, District Judge.

Two questions have been presented to the Court:

1. Does this Court have subject-matter jurisdiction of an appeal from a ruling of the Interior Board of Indian Appeals (the Board)? It does.

2. Was the Board correct in ruling that a lease of Indian trust lands for business purposes pursuant to 25 U.S.C. § 415 (1976) could not be cancelled without the approval of the Secretary of Interior? [1] It was not.

STATEMENT OF F..CTS

In 1969 the Yavapai-Prescott Indian Tribe (the Tribe) [2], as lessor, and Marlin D. Kuykendall, as lessee, entered into a lease agreement for approximately 2.06 acres of land which was to be used for an automobile dealership and service station for a term of 25 years, with an option to renew for an additional term of 25 years. The lease recited that it was

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[1] The BIA's opinion is reported at 8 IBIA 76.

[2] In fact, the lessor is described as "the Yavapai-Prescott Community Association". The Court assumes that it is an agency of the Tribe. In any event no question has been raised about this disparity.

made "under the provisions of the Act of August 9, 1955 (69 Stat. 539)[3] as implemented by part 131, Leasing and Permitting, of the Code of Federal Regulations, Title 25-Indians, and any amendments thereto." Article 19 of the lease provides in part, "[T]he Lessee shall not sublease ... without the prior written approval of the Lessor [and] the Secretary [of the Interior] and ... no such sublease ... shall be valid or binding without such approval.... Should the Lessee attempt to make any such sublease ... such action shall be deemed a breach of this lease...." Article 30 provides in part:

> "... should Lessee default in any payment of moneys ... or should Lessee breach any other covenant of this lease, and if such breach shall continue uncured for a period of sixty (60) days after written notice thereof by the Lessor or the Secretary to Lessee, ... then Lessor and/or the Secretary may [terminate the lease]."

The lease was approved by the Secretary of Interior acting through an authorized agent.

In March 1979 Kuykendall entered into an agreement with a partnership for the sale of his dealership and a sublease of the premises. On April 6th the Tribe informed Kuykendall the sublease was disapproved and notified him that the sublease was a breach of the lease. He was also informed that, to cure the breach, he must remove the partnership from the premises and retake the dealership himself. This was not done, and on June 27, 1979 Kuykendall was informed by a tribal attorney that his lease with the Tribe was terminated. The Secretary of the Interior did not participate in the cancellation of the lease.

In August of 1979, Kuykendall requested the Area Director of the Bureau of Indian Affairs to intervene to prevent the Tribe from cancelling the lease. The Area Director refused to intervene, ruling that the tribe had the

[3] 25 U.S.C. § 415.

authority to cancel the lease, and an administrative appeal was taken to the Board pursuant to 25 CFR 2.19. The Board ruled in favor of Kuykendall, holding that, notwithstanding the provisions of the lease, it could be terminated only by the Secretary pursuant to the provisions of 25 CFR § 131.14. The Tribe has filed this action pursuant to the Administrative Procedure Act (5 U.S.C. § 701 et seq.) to review the Board's decision.

SUBJECT MATTER JURISDICTION

[1, 2] The parties agree that if this Court has jurisdiction of this action, it is derived from 28 U.S.C § 1331, which confers jurisdiction of a civil action which "arises under the Constitution, laws, or treaties of the United States". Kuykendall argues that whether the Tribe may unilaterally cancel the lease "*depends* not upon an interpretation of the Constitution, laws, or treaties of the United States but an interpretation of the *Lease*" (emphasis by Kuykendall) and that "[T]here is no claim in the Complaint that the Board's interpretation of the Lease is contrary to the Constitution, laws, or treaties of the United States." Motion to dismiss at 6 - 7. However, this case involves not only an interpretation of the lease but also the question whether the lease could be terminated by the Tribe unilaterally, without any action on the part of the Secretary. Resolution of the latter issue involves the interrelationship of the lease, the federal regulations and the powers conferred on the Secretary of Interior by 25 U.S.C. § 415. Furthermore, 28 U.S.C. § 1331 confers jurisdiction on Federal Courts to review agency action. *Andrus v. Charlstone Stone Prod. Co.*, 436 U.S. 604, 98 S.Ct. 2002, 56 L.Ed.2d 570 (1978) and *Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed2d 192 (1977).

TRIBE'S AUTHORITY TO CANCEL LEASE

Restricted Indian lands may be leased by the Indian owners, with the approval of the Secretary of Interior, for business purposes, and "all leases and renewals shall be made under such terms and regulations as may be prescribed by

the Secretary of Interior." 25 U.S.C. § 415(a). The Secretary has promulgated regulations relating to the leasing of lands which are held in trust for individual Indians or tribes or are subject to federal restrictions against alienation or encumbrance. 25 CFR § 131.1 et seq. Section 131.14 provides a procedure to be followed by the Secretary in the event that there has been a violation of a lease. The Board concluded that the procedure prescribed by Section 131.14 had to be followed in order to cancel Kuykendall's lease. In this Court's opinion, the Board's ruling is based upon a misapprehension of the meaning of "all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior" in 25 U.S.C. § 415(a).

Among the powers delegated to the Secretary of the Interior by Congress is the management of all Indian affairs. See 25 U.S.C. § 2. The statute authorizing leases of restricted Indian lands for business purposes, 25 U.S.C. § 415, specifically requires that any lease have the approval of the Secretary and that it "shall be made under such terms and regulations as may be prescribed by the Secretary." In this case the Secretary gave his approval, and the lease recited that it was under the provisions of the Act as implemented by Part 131 of the Code of Federal Regulations, Title 25.

[3] Part 131 of Title 25 of the Code of Federal Regulations does not purport to specify in detail the provisions to be included in any lease of Indian lands, and CFR § 131.14 does not purport to specify an exclusive method for cancelling leases. It simply establishes a procedure whereby the Secretary *may* cancel a lease upon a showing satisfactory to him that there has been a violation of the lease.

Pursuant to his statutory authority, the Secretary has imposed certain terms upon the lease in question. Among them are that lease payments be made to the Secretary (Art. 7); in the event of a percentage rental, annual accountings are to be made to the Tribe and the Secretary (Art. 8); any plans for the development of the leased property must be ap-

proved by the Tribe and the Secretary (Art. 10); prior written consent of the lessor and the Secretary is required before a lessee may make any alteration, addition or remodeling of improvements involving an expenditure in excess of $10,000 (Art. 12); certain required bonds must be deposited with the Secretary (Arts. 16 and 27); joint approval by the Tribe and the Secretary is required of building loan agreements, subleases and encumbrancing (Arts. 17, 19 and 22); and provisions made for joint inspection of the leased premises by the Tribe and the Secretary (Art. 41). The Board felt that the foregoing provisions refuted any contention that "the use of the words 'and/or' in Clause 30 constituted a delegation of Secretarial authority to administer leased trust property contrary to Departmental regulations." 8 IBIA at 86.

[4, 5] There is nothing in the Federal Statutes which authorizes the Secretary to terminate a lease of Indian land. However that power is inherent in the powers delegated to him by Congress to supervise the public business of Indian tribes, 43 U.S.C. § 1457, and to manage all Indian affairs, 25 U.S.C. § 2. See *Udall v. Littell*, 366 F.2d 668, *cert. denied*, 385 U.S. 1007, 87 S.Ct. 713, 17 L.Ed.2d 545 (1962). While that power is necessary to enable him to carry out the duties with which he is charged by law, there is nothing to suggest that it is a power exclusively his, which cannot be exercised by anyone else.

[6, 7] Section 415 does not authorize the Secretary to enter into leases of restricted Indian lands for business purposes in behalf of the Indian owners. It provides that the lands "may be leased by the Indian owners," that is, the Indians may negotiate for leases subject only to the inclusion in any lease of "such terms and regulations as may be prescribed by the Secretary" and to his approval of the lease. Nothing in CFR § 131.14 suggests that the Secretary has required that he concur in any decision to cancel a lease because of the lessee's default. Significantly, Article 23 of the lease provides in part, "In the event Lessor terminates this

lease. . . ." That language clearly indicates that the Secretary did not reserve to himself the exclusive right to cancel a lease because of the lessee's default or an intent that any cancellation was to be performed jointly by the Tribe and the Secretary. To the extent that that portion of Article 30 of the lease, which authorizes the tribe to enforce a cancellation, conflicts with 25 CFR § 131.14, the Secretary's approval of the lease has the effect of suspending or superseding the regulation. *Whitebird v. Eagle-Picher Co.*, 258 F.Supp. 308 (N.D.Okla.1966), *Aff'd on other grounds*, 390 F.2d 831 (1968).

IT IS ORDERED as follows:

1. Denying the respondent Marlin D. Kuykendall's motion to dismiss for lack of subject matter jurisdiction.

2. Denying the motions for summary judgment of the respondent Marlin D. Kuykendall and the federal defendants.

3. Granting the petitioner Tribe's motion for summary judgment.

4. Reversing the decision of the Board.

APPENDIX C

United States Department of the Interior
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VIRGINIA 22203

MARLIN D. KUYKENDALL

v.

PHOENIX AREA DIRECTOR AND YAVAPAI-PRESCOTT TRIBE

IBIA 80-24-A Decided June 2, 1980

Appeal from decision by District Director permitting lease of Indian trust lands to be cancelled by tribe without approval of the Secretary.

Reversed.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Factual and Procedural Background

On September 11, 1969, the Superintendent of the Truxton Canyon Agency executed a lease on behalf of the Yavapai-Prescott Community Association with Appellant Kuykendall for a tract of land in Prescott, Arizona, to be used for an automobile agency. The lease incorporates 25 CFR Part 131 by reference, and provides, in the default provisions of the lease, for 30- and 60-day grace periods, following notice of default, during which time appellant shall be permitted to cure any claimed breach of the lease before termination may be sought. [1]

Appellant's initial performance under the lease became the cause for several notices in 1970 and 1971 from the Agency Superintendent that there was failure to make timely survey, failure to provide a plat on time, failure to pay rent on time, failure to show proof of insurance, and failure to being construction as scheduled. By late 1971, however, it appears the

[1] 25 CFR 131.14 provides the lessee shall have a "reasonable" cure time.

initial problems had been overcome; appellant had built a $200,000 garage building on the leased land; the land had been surveyed and found to contain 4 instead of 2 acres. [2] A plat had been furnished, and insurance premiums and rents were being paid.

In 1975 appellant subleased the auto business to Jay Piccinati, without, apparently, any prior consultation with the tribe. [3]

In October 1975, the Agency Superintendent gave appellant notice his sublease to Piccinati was considered to be a breach of his lease with the tribe. The matter was negotiated and finally settled. Also in 1975 the tribe enacted a sales tax ordinance which taxed retail sales on the reservation. In 1977 Piccinati returned the auto business on the leased land to appellant, who during the time of the Piccinati operation had failed to make the agreed lease payments for September 1976, and had failed to make an interest payment claimed to be due on late rents. Appellant had charged Piccinati $2,400 monthly rent, during part of the sublease, although he informed the tribe the rent was to be $1,400. [4]

In March 1979 the partnership of Smith and Henkel subleased the auto business from appellant. Preliminary negotiations involved obtaining the approval of the new operators by the auto manufacturers concerned. While this transaction was going on, appellant claims to have notified the tribal business manager of the proposed sublease and the negotiations for the sale of the business. The manager, however, denies that he was told about the sale and new sublease. Smith and Henkel agreed to pay Appellant Kuykendall $200,000 for the business, subject to tribal approval of the sublease, with the understanding appellant

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[2] Resulting in a doubling of the lease payments to $1,600 from $800.

[3] The former association is now a tribe. 45 FR 27828 (Apr. 24, 1980).

[4] The tribe takes the position it is entitled to charge sales tax on the rental. It claims $3,000 due on this account.

would remain primarily liable for the lease payments and would continue to deal with the tribe concerning the lease.

On March 9, 1979, a form of sublease was presented by appellant to the tribe for approval. The tribe refused to approve the sublease, and demanded more information about the partners, which was supplied. When the tribe discovered that Smith and Henkel had formed a corporation (primarily for tax purposes), it refused to approve the sublease for that stated reason.

On April 6, 1979, the tribe informed appellant the sublease was disapproved, and notified him the sublease was a breach of the lease with the tribe. He was notified that, to cure the breach, he must remove Smith and Henkel and retake the dealership himself. Also on April 6 the tribe notified Smith and Henkel they were in wrongful possession of tribal land. They were given 15 days to obtain an approved sublease or be removed from the land.

On May 16, 1979, the tribe agreed that Smith and Henkel should remain in possession of the leased land; on June 6, 1979, however, they were again notified to quit the property.

On June 27, 1979, appellant was notified by the tribal attorney that his lease with the tribe was terminated. On September 11, 1979, appellant made his annual lease payment to the Truxton Canyon Agency; it was accepted, but later returned.[5] Prior to this transaction, on August 30, 1979, the Area Director had opined in writing that the lease cancellation by the tribe was validly done and was "not subject to our intervention or to our administrative determination."[6]

On September 20, 1979, the tribe approved a law and order code creating a tribal court, which the Truxton Canyon Agency Superintendent approved the same day. An

[5] A memo in the file indicates that this was not a lapse on the part of the agency. The matter was apparently decided only after consultation with Area Director's office.

[6] The appeal is taken from that determination.

undated form of small claim summons and complaint, was served on appellant on October 24, 1979, summoning him to a trial in the newly constituted tribal court on November 26, 1979, in an action brought against him by his sublessees Smith and Henkel for declaratory judgement. Appellant refused to appear, but instead chose to challenge the jurisdiction of the court, questioning that it was properly constituted by appealing from the Superintendent's order of September 20, which approved the code and established the court. Finding Kuykendall in default, the tribal court on February 1, 1980, ordered the improvements on the leased land (the $200,000 auto agency) "forfeited." The Smith-Henkel sublease with Kuykendall was declared "a nullity," and any possessory right of Smith and Henkel was found to depend upon the will of the Yavapai-Prescott Tribe. [7]

Issue on Appeal

On May 8, 1980, this Board determined the interest of administrative economy would be best served by resolution of the apparent threshold issue: Whether a business lease granted by an Indian tribe with approval of the Secretary pursuant to the provisions of 25 U.S.C. § 415 (1976), may be terminated by the tribe without Secretarial approval or action. The Board finds that the lease may not be cancelled without Secretarial approval.

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[7] Earlier, the U.S. District Court for Arizona, in *Kuykendall* v. *McGee*, Civ. No. 79-834 (D. Ariz. Jan. 28, 1980), found that appellant had failed to exhaust his administrative remedies with the Department concerning the lease termination, and dismissed his action for declaratory judgment and injunction against the tribe. In dicta in his order, the Judge assumes the lease provides a clause permitting termination by the tribe. Since he directly finds, however, in support of his judgment, that appellant failed to exhaust his administrative remedy and that the lease properly incorporates the termination provisions of 25 CFR Part 131, this apparent inconsistency properly refers only to the issues respecting tribal sovereignty raised in the Federal case. To find otherwise would make the court's holding meaningless, since the issue referred to this agency (whether this lease was terminated) would otherwise have been decided by the District Court.

Discussion and Conclusions

[1] The first paragraph of the September 11, 1969, lease provides:

> THIS CONTRACT is made and entered into this 11th day of September, 1969, by and between *The Yavapai-Prescott Community Association* hereinafter called the Lessor, whose address is *P.O. Box 1390, Prescott, Arizona,* and *Marlin D. Kuykendall,* hereinafter called the Lessee, whose address is *P.O. Box 911, Prescott, Arizona,* under the provisions of the Act of August 9, 1955 (69 Stat. 539) as implemented by Part 131, Leasing and Permitting, of the Code of Federal Regulations, Title 25 - Indians, and any amendments thereto which by reference are made a part hereof.
> [Emphasis in orginal.]

The incorporation by reference of regulations into Federal contracts is an established procedure in Government contracting. Such provisions in Government contracts are upheld by the courts, which recognize the practice to be binding upon the contracting parties.[8] One of the incorporated regulations, 25 CFR 131.14, requires that termination for breach of a lease entered into under authority of the

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[8] *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO* v. *McElroy,* 367 U.S. 886 (1961); *Rehart* v. *Clark,* 448 F.2d 170 (1971) (for a decision holding applicable regulations to apply to a Government contract, even though not actually incorporated by specific reference, *see, G. L. Christian and Assoc.,* v. *United States* 312 F.2d 418, 427, *rehearing denied,* 160 Ct. Cl. 58, (1963), *cert denied,* 375 U.S. 954 (1963), *rehearing denied,* 376 U.S. 929 (1964)).

regulations appearing at Part 131 is subject to Secretarial approval. [9]

Despite the requirements of 25 CFR 131.14, the Yavapai-Prescott Tribe, relying upon numbered Clause 30, DEFAULT, of the September lease, argues that the Secretary delegated to the tribe the power to cancel the lease when language was inserted into the lease in Clause 30 that

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[9] *See also* 25 CFR 131.5 and 131.12 for further limitations concerning leasing and the power of the Secretary, generally. The statute implemented by these regulations, the Act of August 9, 1955, 69 Stat. 539, 25 U.S.C.A. § 415 (West Supp. 1980), provides in pertinent part:
"(a) Any restricted Indiana lands, * * * tribally * * * owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for * * * business purposes, * * * as determined by said Secretary. All leases so granted shall be for a term of not to exceed twenty-five years, except leases of land * * * on the * * * Yavapai-Prescott Community Reservation * * * which may be for a term of not to exceed ninety-nine years, * * *. Leases for * * * business purposes * * * may include provisions authorizing their renewal for one additional term of not to exceed twenty-five years, and all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior."

"then Lessor and/or the Secretary may either * * * [elect to pursue a number of alternative remedies]." [10]

[10] Numbered Clause 30 provides:

"30. DEFAULT

"Time is declared to be of the essence of this lease. Should Lessee default in any payment of monies or fail to post bond, as required by the terms of this lease, and if such default shall continue uncured for the period of thirty (30) days after written notice thereof by the Lessor or the Secretary to Lessee, during which 30-day period Lessee shall have the privilege of curing such default, or should Lessee breach any other covenant of this lease, and if such breach shall continue uncured for a period of sixty (60) days after written notice thereof by the Lessor or the Secretary to Lessee, during which 60-day period Lessee shall have the privilege of curing such breach, then Lessor and/or the Secretary may either:

"A. Collect by suit or otherwise, all monies as they become due hereunder, or enforce, by suit or otherwise, Lessee's compliance with any other provisions of this lease, or

"B. Re-enter the premises and remove all persons and property therefrom excluding the personal property belonging to authorized sublessees, and either

"(1) Re-let the premises without terminating this lease, as the agent and for the account of Lessee, but without prejudice to the right to terminate the lease thereafter, and without invalidating any right of Lessor and the Secretary or any obligation of Lessee hereunder. Terms and conditions of such re-letting shall be at the discretion of Lessor and the Secretary, who shall have the right to alter and repair the premises as they deem advisable, and to re-let with or without any equipment or fixtures situated thereon. Rents from any such re-letting shall be applied first to the expense of re-letting, collecting, alterning, and repairing, including attorney's fees and any real estate commission actually paid, insurance, taxes and assessments and thereafter toward the payment to liquidate the total due, Lessee shall pay to Lessor monthly, when due, any deficiency, and Lessor and the Secretary may sue thereafter as each monthly deficiency shall arise.

"(2) Terminate this lease at any time and even though Lessor and the Secretary have exercised rights as outlined in (1) above. Exercise of this remedy shall exclude recourse to any other remedy, but shall not preclude recovery of amounts due to Lessor for the period prior to termination.

"C. Take any other action deemed necessary to protect any interest of Lessor. No waiver of a breach of any of the covenants of this lease shall be construed to be a waiver of any succeeding breach of the same or any other convenant.

"Any action taken or suffered by Lessee as a debtor under any insolvency or bankruptcy act shall constitute a breach of this lease. In such event, the Lessor and the Secretary shall have the options set forth in sub-articles (1) and (2) herein, and furthermore, the Lessor is hereby declared to be a first preferred creditor, except as provided in Article 22."

Both the Yavapai-Prescott Tribe and the Phoenix Area Director argue that the language in Clause 30 constitutes a delegation of Secretarial authority to the tribe to cancel the lease for default in the performance of the lessee.[11] It is

[11] The Area Director argues at page 5 of his answer dated November 9, 1979, that the use of the words "and/or the Secretary" are a delegation to the tribe of the power to cancel the lease, and, at page 6, observes that, "Nothing in 25 USC 415 prohibits the Secretary, through lease terms which he approves and has approved in the subject lease, from authorizing the tribe to terminate the lease for cause." The position taken by the tribe is more complex. The tribe assumes a delegation of Secretarial power and seeks to make the theory of tribal sovereignty dispositive of the issue here by stating the issue in the case to be:

"May an organized Indian tribe recognized by both Congress and the Secretary of the Interior, acting under a lease of tribal property which has been negotiated and approved by the Secretary of the Interior, exercise its sovereignty and right of self determination by terminating such lease for a material and substantial breach thereof by the lessor, in accordance with the terms of the lease, or is the sovereignty and self determination of the Tribe limited to the exclusive remedy of requesting the Secretary of the Interior to act in behalf of the Tribe by proceeding under the provisions of 25 CFR 131.14?"
(Answer of the tribe dated November 9, 1979, at page 4.)

difficult, in view of the general tenor of the lease document, [12] to accept their assumption that the use of the words "and/or" in Clause 30 constituted a delegation of Secretarial authority to administer leased trust property contrary to Departmental regulations. The fiduciary relationship of the Secretary to the tribe in such matters is fixed by the regulations required by statute [13] and defined by case law. [14] The phrasing of the second sentence of Clause 30, upon which the tribe relies for its stated position, while awkward, merely refers to the alternative actions to be taken to pursue the various remedies described in Clause 30 which are jointly available to the Secretary and the tribe. Nothing in the language used suggests the Secretary planned to terminate the trust relationship or relinquish the administration of the trust property to the tribe in the event appellant should default. Moreover, the conduct of the par-

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[12] Clause 7 recites that the Secretary is the agent of the tribe for purposes of the lease; payments are to be made to the Secretary. Clause 8 provides accounting under the lease shall be made to the Secretary and tribe, jointly. Clause 10 provides that plans shall be jointly approved by the tribe and the Secretary. Clause 12 provides that major construction shall be jointly approved. Clause 16 provides that required bonds shall be deposited with the Secretary. Clause 17 provides that a construction bond, in a form suitable to the Secretary may be required and that joint approval by the tribe and Secretary will be required prior to obligation of building loan agreements. Clause 19 requires joint approval of subleases. Clause 22 requires joint approval prior to encumbrancing. Clause 24 requires proof of payment to lienors to be furnished jointly to the tribe and Secretary. Clause 26 agrees to hold the tribe and the United States harmless from casualty claims. Clause 29 describes the effect arbitration under the lease may have upon actions by the Secretary. Clause 35 provides that all lessees' obligations under the lease are jointly owed to the tribe and the United States, so long as the land continues in trust status. Clause 41 provides for joint inspection of the leased premises by the tribe and the Secretary.

[13] 25 U.S.C. § 415 (1976).

[14] *See United States* v. *Jim*, 409 U.S. 80 (1972); *United States* v. *Shoshone Tribe of Indians*, 304 U.S. 111 (1938); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831).

ties during the early administration of the lease confirms that the Secretary was not excused from his trust duties by defaults in the lease, but rather he was then required to administer the contract according to the terms respecting default. [15]

[2] Even had the Secretary wished to pursue such a course, he would have been prevented from doing so by the Departmental regulations appearing at 25 CFR Part 131. The agency is bound by its own regulations: Especially where these regulations insure that private citizens directly affected by Government action shall not be deprived of their interests without the due process protections furnished by the agency regulations. [16] In this situation appellant lessee of Indian land claims, correctly, that his lease cannot be cancelled except in conformity to the provisions of 25 CFR 131.14, which, in addition to due process safeguards concerning notice, includes a right of appeal to the Commissioner of Indian Affairs and to this Board. [17] (Suggestion is made in the record before the Board that the regulations could and should be amended by the BIA to provide for administration of business leases by the tribe. See Transcript of Tribal Court Proceedings in *Smith and Henkel* v. *Yavapai-Prescott Community* at 87-91. Notwithstanding the possible merits of this suggestion, the Board is bound by the regulations now in force.)

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[15] From 1969 until 1978, notices to cure were given by the Superintendent. Thus, deficiency notices were sent by the Bureau of Indian Affairs (BIA) to appellant April 20, 1970; January 14, 1971; January 22, 1971; September 25, 1975; December 7, 1976; and December 30, 1976. The tribe's reaction to the sublease to Smith-Henkel in 1978 provided the first indication that the September 11, 1969, lease was not regarded by the tribe as subject to BIA administration. For 9 years of the lease, however, the agency administered the lease for the tribe, and the tribe acquiesced in that arrangement.

[16] *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); *United States* v. *Heffner*, 420 F.2d 809 (4th Cir. 1969).

[17] 25 CFR 2.18, 2.19.

[3] This matter must necessarily be returned to the Phoenix Area Director for regular administration of the lease between the parties. The collateral attempt by the tribal court to cancel appellant's lease by entry of a declaratory judgment that appellant "materially breached the lease" [18] was ineffective in and of itself to result in cancellation since the judgment went beyond the subject matter jurisdiction of that court to enforce. Pursuant to 25 CFR 131.14, promulgated by the Secretary in response to 25 U.S.C. § 415 (1976), the Department is vested with final cancellation authority over business leases of trust land. [19] This holding is not a novel position for the Department, but rather follows past decisions of the Secretary concerning lease cancellations. [20]

Decision

The August 30, 1979, determination by the Phoenix Area Director that the Yavapai-Prescott Tribe was authorized to

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[18] Although there is much in the record concerning the handling of the subleases of the auto dealership (including the transcript of the tribal court proceedings), there is no description of any damage to the tribe caused by the two subleases made by appellant since 1969. The Area Director will need to consider whether there was in fact any breach in this case where it affirmatively appears the sublessees were acceptable to the tribe. He will also need to consider whether the subleases were commercially reasonable and in the best interest of the tribe.

[19] *See Bledsoe* v. *United States*, 349 F.2d 605, 607 (10th Cir. 1965).

[20] Prior decisions of this Board, which are final for the Department, have recognized that leases of tribally owned trust land effectuated under provisions of 25 CFR Part 131 may not be cancelled without Departmental approval. *See Merrill Karlen* v. *Commissioner*, 6 IBIA 181 (1977); *Benjamin D. Vieau* v. *Commissioner*, 6 IBIA 150 (1977); *Alton Brown* v. *Albuquerque Area Director*, 5 IBIA 155 (1976). In a related subject area, it is recognized that cancellation of rights-of-way over tribally owned trust land requires Departmental action. *See* 25 CFR Part 161. This requirement is provided by regulation even though the governing statutes, 25 U.S.C. §§ 323-324 (1976), expressly address only the authority of the Secretary to grant such rights-of-way. *See Whatcom County Park Board* v. *Portland Area Director*, 6 IBIA 196, 84 I.D. 938 (1977); *Brown County, Wisconsin*, 2 IBIA 320 (1974).

cancel appellant's lease with the Yavapai-Prescott Tribe without the approval of the Secretary is set aside. This matter is remanded to the Area Director with instructions to administer the lease pursuant to the provisions of 25 CFR Part 131 and the lease agreement of September 11, 1969. [21]

This decision is final for the Department.

FRANKLIN ARNESS
Franklin Arness
Administrative Judge

We concur:

WM. PHILIP HORTON
Wm. Philip Horton
Chief Administrative Judge

MITCHELL J. SABAGH
Mitchell J. Sabagh
Administrative Judge

[21] Although this entire matter appears to have been fully presented for decision, final action by the Board is not possible since there has been no agency decision on the merits. While the decision reviewed (that the Area Director was without authority to act) is set aside, the question concerning the propriety of the lease cancellation remains yet to be decided. This is a matter for the agency to decide, subject to a further right of appeal to the Commissioner and the Board.

APPENDIX D

CHAPTER 2
CIVIL ACTIONS

Sec. 2.1 Jurisdiction

The Yavapai-Prescott Tribal Court shall have jurisdiction of all suits wherein the defendant is the Yavapai-Prescott Indian Tribe, a member of the Tribe or tribes within its jurisdiction, and of all other suits between members and non-members, which are brought before the Court.

The Yavapai-Prescott Tribal Court shall have exclusive jurisdiction of all suits between the Yavapai Prescott Indian Tribe and any persons, corporations or other legal entities arising out of the use, occupation or lease of any part of the Yavapai-Prescott Reservation by such persons etc., or the taxation of such persons, etc., arising out of the use, occupation or lease of any part of the Yavapai-Prescott Reservation. In all other cases the Tribal Court shall not have jurisdiction over a non-Indian litigant in civil matters unless said non-Indian litigant shall have submitted himself to said jurisdiction by written stipulation or by filing an action in Tribal Court.

Office - Supreme Court, U.S.
FILED
NOV 25 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-359

In the Supreme Court of the United States

OCTOBER TERM, 1983

YAVAPAI-PRESCOTT INDIAN TRIBE, PETITIONER

v.

SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Secretary of the Interior has the exclusive authority under 25 C.F.R. 162.14 to terminate leases of Indian trust land entered into pursuant to 25 U.S.C. (& Supp. V) 415.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute and regulation involved 1

Statement 2

Argument 6

Conclusion 10

TABLE OF AUTHORITIES

Cases:

Brown v. *Albuquerque Area Director*, 5 I.B.I.A. 155 8

Federal Crop Insurance Corp. v. *Merrill*, 332 U.S. 380 8

Haig v. *Agee*, 453 U.S. 280 7

Jicarilla Apache Tribe v. *Andrus*, 687 F.2d 1324 7

Jicarilla Apache Tribe v. *Supron Energy Corp.*, 479 F. Supp. 536 ..... 6, 7

Karlen v. *Commissioner*, 6 I.B.I.A. 181 8

Pankratz v. *Superintendent, Fort Belknap Agency*, 4 I.B.I.A. 231 8

Poafpybitty v. *Skelly Oil Co.*, 390 U.S. 365 ..... 6, 10

Sanitary District v. *United States*, 266 U.S. 405 8-9

Saxbe v. *Bustos*, 419 U.S. 65 7

Page

Cases—Continued:

Sessions, Inc. v. *Ortner*, 3 I.B.I.A. 145 8

Small v. *Commissioner*, 8 I.B.I.A. 18 8

Sunny Cove Development Corp. v. *Cruz*, 3 I.B.I.A. 33 8

Udall v. *Tallman*, 380 U.S. 1 ..... 6, 9

United States v. *California*, 332 U.S. 19 8

United States ex rel. Accardi v. *Shaughnessy*, 347 U.S. 260 8

Utah Power & Light Co. v. *United States*, 243 U.S. 389 9

Vallerto v. *Patencio*, 2 I.B.I.A. 140 8

Vieau v. *Commissioner*, 6 I.B.I.A. 150 8

Vitarelli v. *Seaton*, 359 U.S. 535 8

White Mountain Apache Tribe v. *Bracker*, 448 U.S. 136 9

Statutes and regulations:

Act of June 7, 1935, ch. 202, 49 Stat. 332 2

Act of May 18, 1956, ch. 279, 70 Stat. 157 2

25 U.S.C. 177 9

25 U.S.C. (& Supp. V) 415 ..... 1, 4, 5, 6, 7, 8

Pub. L. No. 89-408, 80 Stat. 132 7

Pub. L. No. 90-182, 81 Stat. 559 7

Pub. L. No. 90-184, 81 Stat. 560 7

Page

Statutes and regulations—Continued:

Pub. L. No. 90-335, § 1(f), 82 Stat. 175 7
Pub. L. No. 90-355, 82 Stat. 242 7
Pub. L. No. 90-534, § 6, 82 Stat. 884 7
Pub. L. No. 90-570, 82 Stat. 1003 7
Pub. L. No. 91-274, §§ 2, 3, 84 Stat. 302 7
Pub. L. No. 91-275, §§ 1, 2, 84 Stat. 303 7
Pub. L. No. 91-558, § 8, 84 Stat. 1468 7
Pub. L. No. 92-182, § 6, 85 Stat. 626 7
Pub. L. No. 92-431, 86 Stat. 723 7
Pub. L. No. 92-472, § 7, 86 Stat. 788 7
Pub. L. No. 92-488, § 4, 86 Stat. 806 7
Pub. L. No. 96-216, 94 Stat. 125 7
Pub. L. No. 96-491, § 3, 94 Stat. 2564 7
25 C.F.R. 1.2 4
25 C.F.R. 2.19 3
25 C.F.R. Pt. 131 (now 25 C.F.R. Pt. 162) 2
Section 162.14 ..... 1, 4, 5, 6, 7
Yavapai-Prescott Indian Tribe Law and Order Code § 2.1 (Sept. 20, 1979) 3

Miscellaneous:

29 Fed. Reg. 2542 (1964) 7
45 Fed. Reg. 27828 (1980) 2

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 707 F.2d 1072. The opinion of the district court (Pet. App. B1-B6) is reported at 528 F. Supp. 695.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1983. The petition for a writ of certiorari was filed on September 2, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATION INVOLVED

25 U.S.C. (& Supp. V) 415 and 25 C.F.R. 162.14 are reproduced in pertinent part at Pet. 2-3.

STATEMENT

1. On September 11, 1969, the Superintendent of the Truxton Canyon Agency of the Bureau of Indian Affairs (BIA) approved a lease which had been entered into by the Yavapai-Prescott Community Association[1] with respondent Kuykendall for a tract of trust land on the Yavapai-Prescott Indian Reservation[2] in Prescott, Arizona. The land was to be used for an automobile agency. The lease incorporates by reference 25 C.F.R. Pt. 131 (now 25 C.F.R. Pt. 162), which subjects the leasing of Indian lands to regulation by the Secretary of the Interior. Article 30 of the lease provides that Kuykendall is to be permitted to cure any claimed breach of the lease and that the Tribe "and/or" the Secretary may sue for monies due or terminate the lease in the event of an uncured breach. Article 19 of the lease prohibits Kuykendall from subleasing the property without the prior written approval of the Tribe and the Secretary and provides that failure to obtain such approval of a sublease would be deemed a breach of the lease. Pet. App. A2-A3, B2, C1-C2.

In March 1979, Kuykendall entered into an agreement with a partnership, Smith and Henkel, for the sale of his automobile dealership and the sublease of the premises. The Tribe disapproved the sublease, notified Kuykendall that he was in breach of the lease, and requested that he cure the breach by retaking the premises himself. When this was not done, Kuykendall was informed by the Tribe on June 27, 1979, that his lease was terminated. The Secretary did not

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[1]The association is treated as a Indian tribal government by the BIA. 45 Fed. Reg. 27828 (1980).

[2]Congress transferred 75 acres of land to the Secretary of the Interior in trust for the Yavapai Indians by the Act of June 7, 1935, ch. 202, 49 Stat. 332. Congress transferred an additional 1,320 acres to the Secretary in trust for the Yavapais by the Act of May 18, 1956, ch. 279, 70 Stat. 157.

participate in or approve the cancellation. Pet. App. A3, B2, C2-C3.

2. In August 1979, Kuykendall requested that the Area Director of the BIA intervene to prevent the Tribe from cancelling the lease. He refused, ruling that the Tribe had the authority to cancel the lease. Pet. App. B2-B3, C3. On September 20, 1979, the Tribe approved a Law and Order Code, under which a Tribal Court was established. Section 2.1 of the Code provided that the Tribal Court had exclusive jurisdiction of all suits between the Tribe and any person arising out of the lease of property on the Yavapai Reservation, but that jurisdiction over non-Indians in all other civil matters would attach only if the non-Indian litigant submitted himself to the jurisdiction of the court by written stipulation or by filing an action in the court. The Tribal Code was approved by the Truxton Canyon Agency Superintendent on the day it was adopted by the Tribe. Pet. App. C3, D1.

Shortly thereafter, Smith and Henkel filed an action in the Tribal Court seeking a declaratory judgment adjudicating its rights in the sublease. Kuykendall refused to appear, challenging the jurisdiction of the court. Finding Kuykendall in default, the Tribal Court ordered the improvements on the land forfeited and nullified the sublease, holding the possessory right of Smith and Henkel to depend on the will of the Tribe. Pet. App. C3-C4.

3. Kuykendall took an administrative appeal to the Interior Board of Indian Appeals, pursuant to 25 C.F.R. 2.19, from the BIA Area Director's decision not to intervene in the cancellation of the lease. The Board reversed the Area Director, concluding in a formal opinion that the Tribe had no power to terminate the lease without the approval of the Secretary (Pet. App. C1-C12). The Board held that, in light of the general tenor of the lease as a whole, Clause 30 could

not be read to grant the Tribe the unilateral authority to cancel the lease. The Board explained that the Secretary had certain fiduciary duties to the Tribe set out in 25 U.S.C. (& Supp. V) 415, implementing regulations, and case law that had not been waived by the lease's termination provision and had previously been carried out by the Secretary in the administration of the lease. In the Board's view, the phrase "and/or" in Clause 30 of the lease, while awkward, merely described the alternative actions that are jointly available to the Secretary and the Tribe and did not confer a unilateral power of termination on the Tribe. Pet. App. C9-C10. The Board also concluded that even if the Superintendent had intended when he approved Clause 30 of the lease to grant termination authority to the Tribe, he was prevented from doing so by the binding effect of 25 C.F.R. 162.14.[3] Nor did the Board find this conclusion altered by the decision of the Tribal Court, because the Tribal Court could not override the final authority of the Secretary with respect to cancellation. The matter accordingly was remanded by the Board to the Area Director for further administration of the lease, including consideration of any question pertaining to cancellation. Pet. App. C10-C12.

4. The Tribe sought judicial review of the Board's decision in the United States District Court for the District of Arizona. In an opinion dated December 21, 1981 (Pet. App. B1-B6), the district court reversed the Board. The court held that, although 25 U.S.C. (& Supp. V) 415 grants the Secretary broad power with regard to the leasing of Indian lands, it did not give him exclusive power to terminate leases. Furthermore, the court believed that while 25 C.F.R. 162.14 set out a procedure by which the Secretary could

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[3]Under 25 C.F.R. 1.2, the Secretary has reserved the power to waive the provisions of a regulation if he determines that it would be in the best interests of the Tribe, but we have been informed by the Department of the Interior that this power to waive applicable regulations has not been delegated to Superintendents of Indian Agencies.

terminate a lease, the regulation did not purport to state the exclusive means of termination. Finally, the court held that by approving Clause 30 of the lease, the Secretary either had confirmed that the Tribe had independent power to terminate the lease or had intended to supersede the regulation. Pet. App. B3-B6.

5. Respondent Kuykendall appealed to the United States Court of Appeals for the Ninth Circuit, and the court of appeals reversed (Pet. App. A1-A8). The court of appeals determined that the question whether the exclusive means for termination of a lease was set out in 25 C.F.R. 162.14 depended on whether granting the Tribe unilateral power of termination would serve the purpose intended by Congress in enacting 25 U.S.C. (& Supp. V) 415 — the enhancement of the profitable development of Indian land (Pet. App. A5). The court observed that to grant the Tribe such power would enhance the Tribe's control of lease provisions but increase the risk that leases would not serve the long-run interests of the Tribe. The court also noted that the Secretary, in the exercise of his power under Section 415, could determine in any event who would have the power of termination. For this reason, the court believed it most consistent with the judicial function to accept the Secretary's present determination, reflected in the Board's decision, that the final authority on this point resided with the Secretary under existing regulations. Pet. App. A5-A6.

The court of appeals also identified several additional considerations to support its holding. First, it noted that to find that the Tribe had a unilateral power of termination would create the possibility of an impasse between the Secretary and the Tribe. Second, the court believed that to give the Tribe unilateral termination authority would tend to depress the value of Indian leases. Finally, the court was not persuaded to abandon its approach merely because of

the "and/or" language in Clause 30, finding the issue too important to turn on such an awkward reference. Pet. App. A7-A8.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Indeed, the question of the interpretation of the regulation governing cancellation of leases is one of first impression. Further review by this Court of the application of that regulation to the terms of the particular lease at issue is not warranted.

1. Petitioner concedes (Pet. 6) that the lease in question is governed by 25 U.S.C. (& Supp. V) 415, which requires that leases of Indian land be approved by the Secretary of the Interior and "be made under such terms and regulations as may be prescribed by the Secretary of the Interior." Pursuant to the quoted authority, the Secretary has promulgated a regulation governing the cancellation of leases. Under that regulation, as the Tribe further concedes (Pet. 6, 9), the Secretary is vested with the final authority to determine whether the lease should be cancelled. 25 C.F.R. 162.14. The Board, on behalf of the Secretary, construed the regulation to prescribe the *exclusive* method for terminating a lease entered into pursuant to 25 U.S.C. (& Supp. V) 415. The Secretary's interpretation of his own regulation is entitled to substantial deference. *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965). That construction, moreover, is sound. Because the Secretary must approve a lease in the first place, it is only logical that he would preserve the ultimate power to approve a termination, in order to protect the Indian owner against an improvident decision that could diminish the value of the land. In *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365 (1968), which involved a similar statutory and regulatory scheme for the leasing of Indian lands, the Court sustained the power of the Indian owner to sue for

breach of the lease, but recognized the authority of the Secretary under applicable regulations to impose the more "severe" remedy of termination. 390 U.S. at 374.[4] See also *Jicarilla Apache Tribe* v. *Supron Energy Corp.*, 479 F. Supp. 536, 553 (D. N.M. 1979). Cf. *Jicarilla Apache Tribe* v. *Andrus*, 687 F.2d 1324, 1332-1335 (10th Cir. 1982). There is no reason for a different result here.

The lease termination provisions now set forth in 25 C.F.R. 162.14 were first promulgated in 1964 (29 Fed. Reg. 2542), and they have been in effect ever since. Congress has amended Section 415 numerous times since then,[5] but has never limited the Secretary's termination authority set forth in the regulation. Thus, if 25 U.S.C. (& Supp. V) 415 does not itself require that the Secretary have final authority over lease terminations, this congressional action and inaction strongly support the conclusion that the Secretary acted well within his statutory authority by preserving that authority in the regulations he is expressly authorized by Section 415 to promulgate. *Haig* v. *Agee*, 453 U.S. 280, 290-291, 298-301 (1981); *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974). This conclusion is bolstered by the fact that, in practice, it has been the Secretary who has effectuated the

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[4]The Tribe's assertion (Pet. 12-13) that the decision below is inconsistent with *Poafpybitty* therefore is without merit.

[5]See Pub. L. No. 89-408, 80 Stat. 132; Pub. L. No. 90-182, 81 Stat. 559; Pub. L. No. 90-184, 81 Stat. 560; Pub. L. No. 90-335, § 1(f), 82 Stat. 175; Pub. L. No. 90-355, 82 Stat. 242;Pub. L. No. 90-534, § 6, 82 Stat. 884; Pub. L. No. 90-570, 82 Stat. 1003; Pub. L. No. 91-274, §§ 2, 3, 84 Stat. 302; Pub. L. No. 91-275. §§ 1, 2, 84 Stat. 303; Pub. L. No. 91-558, § 8, 84 Stat. 1468; Pub. L. No. 92-182, § 6, 85 Stat. 626; Pub. L. No. 92-431, 86 Stat. 723; Pub. L. No. 92-472, § 7, 86 Stat. 788; Pub. L. No. 92-488, § 4, 86 Stat. 806; Pub. L. No. 96-216, 94 Stat. 125; Pub. L. No. 96-491, § 3, 94 Stat. 2564.

termination of leases of Indian lands.[6] This has been true even where, as here, the lease itself allows the Indian lessor to make such termination without mentioning the Secretary's approval authority. See *Vallerto* v. *Patencio*, 2 I.B.I.A. 140 (1974). Moreover, as the Tribe freely admits (Pet. 11-12), the Secretary's decision whether to approve a lease is committed to his discretion, once he has satisfied himself that certain criteria set out in 25 U.S.C. (& Supp. V) 415 have been met. Thus, the Secretary simply could refuse to approve a lease that did not grant him termination authority, thereby creating an impasse with a Tribe that insisted upon having that authority. For these reasons, the Secretary's interpretation of the regulations is entirely reasonable.

2. The Tribe contends (Pet. 4 n.1, 6, 12, 17), however, that language in the lease itself grants it the authority to terminate the lease without Secretarial approval. But as the Tribe concedes (Pet. 3-4), if the lease were construed in that manner, it would conflict with the regulation discussed above that explicitly vests final authority in the Secretary to approve terminations. Agencies ordinarily are bound by their own regulations (*Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954)), and there is a substantial question here whether the unauthorized approval of a lease inconsistent with the regulations could bind the Secretary. See, *e.g.*, *United States* v. *California*, 332 U.S. 19, 39-40 (1947); *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 383-384 (1947); *Sanitary District* v. *United States*, 266 U.S.

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[6]See *Small* v. *Commissioner*, 8 I.B.I.A. 18 (1980); *Karlen* v. *Commissioner*, 6 I.B.I.A. 181 (1977); *Vieau* v. *Commissioner*, 6 I.B.I.A. 150 (1977); *Brown* v. *Albuquerque Area Director*, 5 I.B.I.A. 155 (1976); *Pankratz* v. *Superintendent, Fort Belknap Agency*, 4 I.B.I.A. 231 (1975); *Sunny Cove Development Corp.* v. *Cruz*, 3 I.B.I.A. 33 (1974); *Sessions, Inc.* v. *Ortner*, 3 I.B.I.A. 145 (1974).

405, 427 (1925); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917). Especially against this background, the court of appeals and Board correctly construed the phrase "and/or" in Clause 30 of the lease not to confer on the Tribe a unilateral power of termination. Pet. App. A7-A8, C5-C10.

As the Board pointed out (Pet. App. C9 & n. 12), the lease generally gives final approval authority in *all* matters relating to the administration of the lease to the Secretary. Therefore, to assume that what the court of appeals and Board termed the "awkward" phraseology in Clause 30 (Pet. App. A8, C9) leaves an administrative matter of such importance as termination within the sole discretion of the Tribe is inconsistent with the general tenor of that document. The language "and/or" in question instead reasonably should be read to confer the power of termination on the Tribe and the Secretary acting together or on the Secretary acting alone. The interpretation of the lease adopted by the court of appeals is, as that court noted (Pet. App A6), the one chosen by the Secretary, the official responsible for its contents, and therefore should be shown great deference by the courts. *Udall* v. *Tallman, supra*. There is, accordingly, no reason for this Court to review that construction.

3. Contrary to the Tribe's assertions (Pet. 6-7, 8-9, 13, 18), this result is in no way inconsistent with accepted principles of tribal sovereignty. That sovereignty always is subordinate to the power of Congress (see, *e.g.*, *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143 (1980)), and the court of appeals in this case simply construed a regulation issued pursuant to an Act of Congress to require Secretarial consent to the termination of a lease that the Secretary had approved in the first place. In view of the pervasive federal control over transactions involving Indian property (*e.g.*, 25 U.S.C. 177), this holding cannot be regarded as a departure from usual practices. Nor

does the decision below call into question the general authority of tribal courts, as the Tribe also maintains (Pet. 6-7, 13-15). The decision below does not undermine the jurisdiction of the Tribal Court to adjudicate disputes concerning leased property — *e.g.*, in a suit for damages for violation of the lease. The court of appeals held only that the Tribal Court is bound by, and therefore cannot excuse compliance with, the regulation requiring Secretarial approval of the termination of a lease. The Tribe is not, of course, without remedy for violations of leases of its land. As this Court held in *Poafpybitty*, the Tribe may seek remedies for breach in court. Furthermore, it may still seek approval of the cancellation of the lease from the Secretary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NO. 83-359

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

YAVAPAI-PRESCOTT INDIAN TRIBE

Petitioner,

v.

JAMES G. WATT, et al.
and MARLIN D. KUYKENDALL

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Is an administrative decision by the United States Interior Board of Indian Appeals, interpreting a lease between an Indian tribe and a nonmember lessee as requiring resort to a procedure set forth in federal regulations for its cancellation, arbitrary, capricious, an abuse of discretion, or otherwise contrary to law?

TABLE OF CONTENTS

		Page
Question Presented.		i
Table of Authorities.		v
Constitutional and Statutory Provisions Involved		1
Statement of the Case		4
Summary of Argument		7
Reasons for Denying Writ.		9
I	THE NINTH CIRCUIT'S DECISION IMPACTS SOLELY ON THE LEASE RELATIONSHIP BETWEEN PETITIONER AND RESPONDENT AND PRESENTS NO OUESTIONS OF FEDERAL LAW WITH PUBLIC POLICY IMPLICATIONS FOR LESSEES OF INDIAN LANDS OR INDIAN TRIBES GENERALLY.	9
II	THE NINTH CIRCUIT'S DECISION IS IN ACCORD WITH THE STANDARD OF REVIEW OF AGENCY ACTION UNDER THE ADMINISTRATIVE PROCEDURE ACT	18
III	THE BOARD'S DECISION IS COMPELLED BY THE UNITED STATES CONSTITUTION AND THE TRUST RESPONSIBILITY OF THE UNITED STATES OVER LANDS HELD IN TRUST FOR THE YAVAPAI-PRESCOTTS. . . .	26

Page

A. The Board's administrative interpretation of the lease and 25 C.F.R. § 162.14 is compelled by the United States Constitution 26

B. The Board's administrative interpretation of the lease and 25 C.F.R. § 162.14 is compelled by the trust responsibility conferred upon the Secretary of the Interior relative to Indian lands 31

C. The Board's administrative interpretation of the lease and 25 C.F.R. § 162.14 is not contrary to congressional policies relative to tribal self-government. 36

D. The Board's administrative interpretation of the lease and of 25 C.F.R. § 162.14 is not contrary to this Court's pronouncements relative to tribal self-government 38

Conclusion. 42

Page

Appendices

Appendix A, Portions of the lease between Marlin D. Kuykendall and the Yavapai-Prescott Community Association.

1. Introductory Paragraph A-1-1

2. Section 29. . . . . A-2-1

3. Section 34. . . . . A-3-1

TABLE OF AUTHORITIES

	Page
CONSTITUTIONAL PROVISIONS:	
United States Constitution:	
article IV, § 3, cl.2. . . .	1,27,31
CASES:	
Bowles v. Seminole Rock & Sand Co., 325 U.S 410 (1945).	21
Buster v. Wright, 135 F. 947 (8th Cir. 1905)	40,41
Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).	18
Hynes v. Grimes Packing Co., 337 U.S. 86 (1949).	38
Jicarilla Apache Tribe v. Supron Energy Corp., 479 F. Supp. 536 (D.N.M. 1979)	36
Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F. 2d 370 (1st Cir. 1975)	32
Kuykendall v. Phoenix Area Director, 8 IBIA 76 (1980).	6,12,13, 14,22,35, 36

Page

Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890). 28

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). 40

Montana v. United States, 450 U.S. 544 (1981) 38,39

Morris v. Hitchcock, 194 U.S. 384 (1904). 40

N.L.R.B. v. Boeing Co., 412 U.S. 67 (1973). 22,25

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). 29

Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968). 13,15,16 17

Saxbe v. Bustos, 419 U.S. 65 (1974) 22,25

Udall v. Tallman, 380 U.S. 1 (1965). 20

United States v. Kagama, 118 U.S. 375 (1886) 28

United States v. Rogers, 45 U.S. (4 How.) 567 (1846). 28

Page

United States v. Wheeler, 435 U.S. 313 (1978) 21,29

Vitarelli v. Seaton, 359 U.S. 535 (1959) 24

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) 37, 39

Williams v. Lee, 358 U.S. 217 (1959). 39

Wisconsin Central Railroad Co. v. Price County, 133 U.S. 496 (1890) 28,31

Yavapai-Prescott Indian Tribe v. Watt, 528 F. Supp. 695 (D.C. Ariz. 1981) 6

Yavapai-Prescott Indian Tribe v. Watt, 707 F. 2d 1072 (9th Cir. 1983). 6,14

STATUTES AND REGULATIONS:

United States Statutes at Large

Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848). 26

Curtis Act, Ch. 517, 30 Stat. 495 (1898) 41

Act of May 26, 1926, Ch. 403, 44 Stat. 658 25

	Page
Indian Reorganization Act, Ch. 576, 48 Stat. 984 (1934).	4,36,38
Act of June 7, 1935, Ch. 202, 49 Stat. 332	1,5
Act of March 15, 1948, Ch. 120, 62 Stat. 80.	25
Act of May 18, 1956, Ch. 279, 70 Stat. 157	2, 5
Indian Financing Act of 1974 Pub.L.No. 93-262, 88 Stat. 77.	37
Indian Self Determination and Education Assistance Act of 1975, Pub.L.No. 93-638, 88 Stat. 2203	37,38
United States Code (1983)	
5 U.S.C. § 701.	6,18
5 U.S.C. § 706.	18,19
25 U.S.C. § 177	2,29
25 U.S.C. § 415	5,13,22, 23,24, 29,30
25 U.S.C. § 450n.	38
25 U.S.C. § 462	38

	Page
Code of Federal Regulations *	
25 C.F.R. § 16 (1929)	23
25 C.F.R. § 131.1 et seq. (1981)	5
25 C.F.R. Part 162	5,11,13, 17,30
25 C.F.R. § 162.14.	10,11,14, 17,19,22, 24,26,31, 36,38
25 C.F.R. § 166.15.	23
25 C.F.R. § 162.15(e)	25,34
25 C.F.R. § 168.10.	23
25 C.F.R. § 169.20.	23
25 C.F.R. § 211.27.	23
25 C.F.R. § 212.23.	23
25 C.F.R. § 213.40.	23
25 C.F.R. § 213.42.	34
25 C.F.R. § 214.25.	23
25 C.F.R. § 216.10.	23

---

* All C.F.R. citations are to the 1983 edition unless otherwise noted.

Page

Federal Register, 43 Fed. Reg. 50217 (1978) [to be codified later at 25 C.F.R. part 131 (now part 162)] (Proposed Oct. 27, 1978) 24

OTHER AUTHORITY

Chambers & Monroe, "Regulating Sovereignity: Secretarial Discretion and the Leasing of Indian Lands," 26 Stan. L. Rev. 1061 (1974) 25

Davis, Administrative Law Treatise §7:14 (1978). . . . 22

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the statutes cited in the Petition at 2-3, consideration of the following constitutional provision and statutes is necessary:

1. United States Constitution, article IV, section 3, clause 2 ("Property Clause"):

> Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

2. Act of June 7, 1935, Ch. 202, 49 Stat. 332, provides in relevant part as follows:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction over that tract of land, identified under a metes-and-bounds description . . . containing approximately seventy-five acres, is hereby transferred from the Veterans' Administration to the Depart-

ment of the Interior, and the title to said described lands shall remain in the United States in trust for the Yavapai Indians.

3. Act of May 18, 1956, Ch. 279, 70 Stat. 157, provides in relevant part as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction over one thousand three hundred and twenty acres of land, more or less, formerly a part of the Fort Whipple Military Reservation, Arizona, and subsequently transferred to the Veterans' Administration by section 6 of the Act of March 4, 1931 (16 Stat. 1550), is hereby transferred to the Secretary of the Interior, and the title to such lands shall be held by the United States in trust for the Yavapai Indians, subject to any valid and existing rights in such lands. . . .

4. United States Code, Title 25, Section 177 provides in relevant part as follows:

No purchase, grant, lease, or other conveyance of lands,

or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. . . .

STATEMENT OF THE CASE

The present controversy arises out of a ground lease between Marlin D. Kuykendall ("Kuykendall"), as lessee, and the Yavapai-Prescott Community Association (the "Yavapai-Prescotts"),[1] as lessor, approved in 1969 by the Phoenix Area Director of the Bureau of Indian Affairs. The lease involves slightly greater than four acres of bare ground located within the approximately 1,395 acres of land held by the Secretary of the Interior in an express trust for the

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[1] The Yavapai Prescott Community Association was formed in 1962, by a group of Yavapai Indians who adopted articles and bylaws which were approved by the Commissioner of Indian Affairs on December 5, 1962. A 1975 amendment changed the name of the association to the Yavapai-Prescott Tribe. The United States has never entered a treaty with this association or tribe. The Yavapai-Prescotts have never organized pursuant to the provisions of the Indian Reorganization Act, Ch. 576, 48 Stat. 984 (1934).

benefit of the Yavapai Indians.[2] The ground lease was entered into pursuant to the provisions of 25 U.S.C. § 415 and the regulations thereunder found at 25 C.F.R. Part 162.[3]

The history of the dispute between Kuykendall and the Yavapai-Prescotts is set forth in the decision of the United States Interior Board of In-

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[2] Congress transferred 75 acres to the Secretary of the Interior in trust for the Yavapai Indians by an Act of June 7, 1935, Ch. 202, 49 Stat. 332. An additional 1320 acres were transferred by Congress to the Secretary of the Interior in trust for the Yavapai Indians by an Act of May 18, 1956, Ch. 279, 70 Stat. 157.

[3] These regulations were previously designated 25 C.F.R. §§ 131.1 et seq. The first paragraph of the lease specifically incorporates the regulations at 25 C.F.R. Part 162, reciting that the lease is entered into under 25 U.S.C. § 415 "as implemented by Part 131 [now 162], Leasing and Permitting, of the Code of Federal Regulations, Title 25 -- Indians, and any amendments thereto which by reference are made a part hereof." App. A-1 hereto.

dian Appeals (the "Board"). Kuykendall v. Phoenix Area Director, 8 IBIA 76 (1980); Petition App. C.

The Yavapai-Prescotts sought judicial review of the Board's decision under the Administrative Procedure Act, 5 U.S.C. § 701 et seq., and the District Court reversed the Board's decision. Yavapai-Prescott Indian Tribe v. Watt, 528 F. Supp. 695 (D.Ariz. 1981); Petition App. B. Kuykendall appealed, and the Ninth Circuit reinstated the Board's decision. Yavapai-Prescott Indian Tribe v. Watt, 707 F.2d 1072 (9th Cir. 1983); Petition App. A.

SUMMARY OF ARGUMENT

I. Both the agency and the Ninth Circuit interpreted the lease itself as requiring the Secretary of the Interior to be involved in any cancellation thereof.

II. There has been no demonstration by the Petitioner either in the proceedings below or before this Court that the agency's and the Ninth Circuit's interpretation of the lease is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

III. The agency's and the Ninth Circuit's interpretation of the lease is (a) compelled by the Constitution, (b) compelled by the trust responsibility of the United States, (c) not contrary to any congressional policy relative to tribal self-government,

and (d) in accord with the decisions of this Court.

IV. The Petition presents no questions of federal law with public policy implications warranting review by this Court; nor does the case present a conflict between circuit courts or with any decision of this Court and review is not warranted.

REASONS FOR DENYING WRIT

I

THE NINTH CIRCUIT'S DECISION IMPACTS SOLELY ON THE LEASE RELATIONSHIP BETWEEN PETITIONER AND RESPONDENT AND PRESENTS NO QUESTIONS OF FEDERAL LAW WITH PUBLIC POLICY IMPLICATIONS FOR LESSEES OF INDIAN LANDS OR INDIAN TRIBES GENERALLY.

The Petition seeks the reversal of a decision of the United States Court of Appeals for the Ninth Circuit upholding a decision of the Board. Recognition of the issues presented to this Court thus requires a clear understanding of the issues before the Board and the precise nature of the Board's decision.

The Board was presented with a lease dispute between Kuykendall and the Yavapai-Prescotts. The Board decided that Section 30 of the lease in question did not authorize unilateral tribal cancellation but, rather, required resort to

the lease termination procedure set forth in 25 C.F.R. § 162.14. The critical decision reached by the Board was, therefore, an interpretation of the terms of the lease. Once the Board reached its decision regarding the proper interpretation of the lease, its remaining discussion of the ability of the Secretary of the Interior to confer a unilateral power of lease termination upon an Indian tribe if he chose to do so (the Board having concluded that he did not purport to do so) is pure dicta, albeit correct dicta.

The Yavapai-Prescotts seek to elevate what is essentially a lease dispute between a single landlord and a single tenant into a policy issue affecting all Indian tribes and all occupiers of reservation lands, and they do so by repeatedly misstating the terms of the lease. First, on three occasions the Petition erroneously asserts that Section

30 of the lease permits "either the tribe or the Secretary" to terminate the lease, and adds emphasis by italicizing "either" and "or." Petition at 4 n.1, 12 & 17. Second, the Petition erroneously asserts, without argument, that the lease termination procedure in Section 30 of the lease is contrary to the lease termination procedure set forth in 25 C.F.R. § 162.14. Petition at 3-4. But repetition of erroneous facts and erroneous conclusions, even if accompanied by emphasis, cannot change the fact that Section 30 of the lease does not state that "either the tribe or the Secretary" may terminate the lease (see below) or the fact that both the Board and the Ninth Circuit construed the lease as consistent with 25 C.F.R. § 162.14, thereby giving effect to the lease provision specifically incorporating by reference the regulations in 25 C.F.R. Part 162. Each and every asser-

tion in the Petition that the Yavapai-Prescotts have been denied the right to terminate the lease "in accordance with its terms" (Petition at 6, 10, 13 & 16) is based upon the completely unwarranted assumption that the lease conferred such a right upon them.[4/]

Section 30 of the lease provides for written notice of breach and an opportunity to cure and, if the breach is not cured within the applicable period, "then Lessor and/or the Secretary may either" (a) collect rent or enforce compliance by suit or otherwise; or (b) re-enter and either re-let or terminate the lease; or (c) take any other action

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4/ The Board recognized that the Yavapai-Prescotts made this same assumption in proceedings before the Board. 8 IBIA 76, 85 n.11; Petition App. C at 8-9.

to protect the interest of the Lessor.[5/] The phrase "Lessor and/or the Secretary" in Section 30 contemplates that certain of the enumerated actions in that section require joint conduct of the Secretary "and" the Lessor and certain other actions may be taken by the Secretary "or" the Lessor.[6/] The Board, after a

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5/ Section 30 of the lease is quoted in its entirety in the decision of the Board. 8 IBIA 76, 83 n.11; Petition App. C at 7.

6/ For example, there can be no dispute that the Secretary "or" the Lessor could, under Section 30(A) of the lease, "collect by suit or otherwise all monies as they become due" under the lease "or enforce by suit" compliance with the lease. See Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968). By the same token, there can be no dispute that Section 30 contemplates joint action of the Secretary "and" the Lessor to re-let the premises since the statute (25 U.S.C. § 415) and the regulations (25 C.F.R., Part 162) require joint action of the Lessor "and" the Secretary to lease this land. The phrase is entirely consistent with the regulations if the word "and" applies to

(Footnote continued on following page)

thorough analysis of the terms of the lease and the trust responsibility of the Secretary of the Interior, construed the "and/or" phrase, insofar as applicable to the remedy of termination, as requiring resort to the lease termination procedure set forth in 25 C.F.R. § 162.14. 8 IBIA 76, 82-86; Petition App. C at 5-10. The Ninth Circuit agreed: "The Secretary did not read this clause as the Tribe suggests, nor do we." 707 F.2d at 1076.

The Petition asserts that the decisions of the Board and the Ninth Cir-

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6/ (Continued from previous page)

the optional remedies described in Section 30(B)(1) and Section 30(B)(2) and the word "or" applies to the optional remedies described in Section 30(A) and Section 30(C). This construction is fully supported by the last sentence of Section 30(C), which uses the conjunctive "the Lessor and the Secretary" in referring to the optional remedies described in both Section 30(B)(1) and Section 30(B)(2).

cuit are contrary to this Court's decision in Poafpybitty v. Skelly Oil Co., supra. In Poafpybitty, the Court discussed the ability of individual Indians holding allotted land to maintain a damage action for breach of express and implied covenants contained in a lease between those Indians and a lessee, approved by the Department of the Interior. The Court held that the regulations promulgated by the Secretary of the Interior to govern oil and gas leases, while an exercise of supervisory authority in considerable detail, did not prevent the Indians from seeking damages for an alleged violation of the lease where "there is nothing in the lease or regulations requiring the Indians to seek administrative action . . . instead of instituting legal proceedings on their own." Id. at 373 (emphasis added). Most importantly, however, the Court acknowl-

edged the existence of a federal regulation controlling the cancellation of an oil and gas lease and, by clear implication, excised from the judicial relief that could be sought by the Indians an action for cancellation of the lease.

> The regulations do empower the Secretary to cancel a lease "for good cause upon application of the lessor or lessee, or if at any time the Secretary is satisfied that the provisions of the lease or of any regulations heretofore or hereafter prescribed have been violated." 25 C.F.R. § 172.23 (1967). However, there is no justification for concluding that the severe sanction of cancellation of the lease is the only relief for all breaches of the lease terms or for any failure to pay royalties. Both the lessor and the lessee may wish to resolve their disagreement by the payment of damages and not by the cancellation of a basically satisfactory lease.

Id. at 374. Acknowledging that the Yavapai-Prescotts could, under Section 30(A) of the lease, either "collect by suit or otherwise all monies as they be-

come due" or "enforce by suit" Kuykendall's compliance with the lease is a far cry from acknowledging the right of the Yavapai-Prescotts to exercise a unilateral power to cancel the lease without resort to 25 C.F.R. § 162.14, particularly where the lease specifically incorporates by reference the regulations in 25 C.F.R. Part 162. Unlike Poafpybitty, in this case both the lease and the regulations require the Yavapai-Prescotts to seek administrative action to cancel the lease. The Poafpybitty decision is fully consistent with the decisions of the Board and the Ninth Circuit.

II

THE NINTH CIRCUIT'S DECISION IS IN ACCORD WITH THE STANDARD OF REVIEW OF AGENCY ACTION UNDER THE ADMINISTRATIVE PROCEDURE ACT.

The action in the court below was commenced under the Administrative Procedure Act, 5 U.S.C. § 701 et seq. The standard of judicial review of agency action under the Administrative Procedure Act is set forth in 5 U.S.C. § 706, which provides that a reviewing court shall hold unlawful and set aside agency action only if the action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or if the action failed to meet constitutional, statutory or procedural requirements. 5 U.S.C. § 706(2)(A), (B), (C), (D); see Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

The point of difference between the Yavapai-Prescotts and the Board is simply stated: Whereas the Board determined that Section 30 of the lease did not confer a power of unilateral termination on the Yavapai-Prescotts and that 25 C.F.R. § 162.14 set forth the exclusive means by which the lease could be cancelled, the Yavapai-Prescotts assert that Section 30 of the lease did confer such a power and that this same regulation does not purport to specify an exclusive method for cancelling the lease. But the Yavapai-Prescotts do not demonstrate, nor could they, that the Board's administrative interpretation of the lease or the regulation was, as required by 5 U.S.C. § 706, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or contrary to constitutional, statutory or procedural requirements. The Yavapai-Prescotts would have

the federal courts simply substitute their interpretation of the lease and the regulation for the judgment of the federal agency specifically authorized by statute to supervise the leasing of tribal lands. The Ninth Circuit properly declined to do so, and cogently articulated the reasons supporting judicial deference to the Board's administrative interpretation of the lease and the regulation.

The reversal of the Board's decision would violate every rule developed to guide a reviewing court's approach to supervising agency action. In Udall v. Tallman, 380 U.S. 1, 16 (1965), this Court stated:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by officers or agency charged with its administration. . . . When the construction of an administrative regulation rather than a statute is in is-

> sue, deference is even more clearly in order. (Emphasis added.)

In Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14 (1945), this Court stated:

> Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. (Emphasis added.)

The views of the Department of the Interior on Indian affairs is of particular significance to this Court. See United States v. Wheeler, 435 U.S. 313, 328 n.27 (1978).

In addition to these general rules of judicial deference to administrative interpretation of statutes and regulations, courts give extra authoritative

weight to administrative interpretations which are made contemporaneously with the enactment of a statute, which have been followed over a long period,[7] or which have been outstanding at the time of legislative reconsideration of a statute. See Saxbe v. Bustos, 419 U. S. 65, 74 (1974); N.L.R.B. v. Boeing Co., 412 U.S. 67, 74-75 (1973); Davis, Administrative Law Treatise, § 7:14 (1978).

The regulation now found at 25 C.F.R. § 162.14 has been in existence since the enactment of 25 U.S.C. § 415 in 1955.[8] In fact, this regulation has its

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[7] The Board found nothing "novel" in its conclusion. 8 IBIA at 88 n.20; Petition App. C at 11. The Board also found the prior conduct of the parties consistent with its conclusion. 8 IBIA at 86 n. 15; Petition App. C at 10.

[8] Comparable cancellation regulations exist with respect to leases, permits and rights-of-way granted under other federal

(footnote continued on next page)

origin in the first generally-applicable leasing regulations relating to Indian lands promulgated by the Department of the Interior in 1929.[9] Then, leases of restricted Indian lands were permitted under different statutory authority for much shorter periods of time than permitted by 25 U.S.C. § 415; however, the

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[8] (continued from previous page)

statutes pertaining to Indian lands. See e.g., 25 C.F.R. §§ 166.15, 168.10, 169.20, 211.27, 212.23, 213.40, 214.25, 216.10.

[9] Section 16 of the 1929 regulations read as follows: "The superintendent should make every effort to see that lessees and permittees comply with the regulations and the terms of their contracts. Should violations thereof occur, the superintendent should serve written notice on the lessee to show cause why the lease should not be canceled. Upon receipt of the answer it should be transmitted to the Commissioner of Indian Affairs with a full report of the facts and the superintendent's recommendations."

regulations still mandated secretarial involvement in terminations.[10/]

Since 1955, Congress has reconsidered and amended 25 U.S.C. § 415 no less than 16 times. Despite the continuing existence of a regulation requiring secretarial involvement in lease terminations, dating back to 1929, Congress has failed to change the basic law to permit the Indian owners to unilaterally terminate leases without secretarial in-

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10/ In 1978, an amendment was proposed to 25 C.F.R. § 162.14 stating: "If the lease provides different remedies for default by a lessee, the provisions of the lease shall govern." 43 Fed. Reg. 50217, October 27, 1978. The proposed amendment is not yet effective. The decisions of the Board and the Ninth Circuit correctly noted that an agency is bound by its own regulations until amended and that all parties are bound by regulations currently in force. Vitarelli v. Seaton, 359 U.S. 535, 539 (1959).

volvement.[11] The failure by Congress to change the law in the face of this consistent administrative interpretation, after many opportunities to do so, demonstrates that Congress intended that the statute be interpreted as the regulation now provides. Saxbe v. Bustos, supra; N.L.R.B. v. Boeing Co., supra.

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[11] That Congress was aware of its ability to confer a unilateral power of termination upon an Indian is clear from the Act of May 26, 1926, Ch. 403, 44 Stat. 658, as amended by the Act of March 15, 1948, Ch. 120, 62 Stat. 80, which permitted Crow Indians classified as competent to lease trust lands without secretarial approval. The implementing regulation, 25 C.F.R. § 162.15(e), specifies that a competent Crow Indian shall have full responsibility for obtaining compliance with the terms of a lease not approved by the Secretary. See Chambers & Monroe, Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands, 26 Stan.L.Rev. 1061, 1075-76 (1974).

III

THE BOARD'S DECISION IS COMPELLED BY THE UNITED STATES CONSTITUTION AND THE TRUST RESPONSIBILITY OF THE UNITED STATES OVER LANDS HELD IN TRUST FOR THE YAVAPAI-PRESCOTTS.

A. The Board's administrative interpretation of the lease and 25 C.F.R. § 162.14 is compelled by the United States Constitution.

The lease in question covers land that has been federal land since the date of its acquisition from the Republic of Mexico by virtue of the Treaty of Guadalupe Hidalgo in 1848. 9 Stat. 922. Article XI of that treaty recognized that the ceded territory was then occupied by various Indian tribes "who will hereafter be under the exclusive control of the government of the United States."

The control of the public domain and other property belonging to the United States is vested exclusively in

Congress by article IV, section 3, clause 2, of the United States Constitution, the so-called "Property Clause," which states: "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." By virtue of the Property Clause, the United States is the only sovereign with power over lands owned by the United States --to the exclusion of all others.

> The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. . . . Having rightfully acquired said territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete. No State of the Union had any such right of sovereignty over them; no other country or government has any such right.

Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 42-43 (1890). The authority vested in Congress by the Property Clause "implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise." Wisconsin Central Railroad Co. v. Price County, 133 U.S. 496, 504 (1890).[12/]

Indian reservations are "a part of the territory of the United States," and Indian tribes hold and occupy tribal lands "with the assent of the United States, and under their authority." United States v. Rogers, 45 U.S. (4 How.)

12/ That Indian tribes were within the contemplation of the Court in the Latter-Day Saints and Wisconsin Central decisions is clear from its decision four years earlier in United States v. Kagama, 118 U.S. 375 (1886), in which the Court held that all governmental power in the United States exists in subordination to one of two sovereigns--the United States and the States of the Union.

567, 571-72 (1846). Whatever might be the scope of the sovereign powers of Indian tribes, their powers over federal lands are clearly among those of which they have been explicitly divested by the self-executing effect of the Property Clause. See United States v. Wheeler, supra at 326; Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208-09 (1978). In this area, Indian tribes have only such powers as may be specifically recognized in them by Congress. In the absence of statutory authorization, Indian tribes would be absolutely prohibited from leasing tribal lands. 25 U.S.C. § 177.

Title 25 U.S.C. § 415 is an exercise by Congress of its power over federal lands, authorizing the leasing of restricted Indian lands for business purposes only with the approval of the Secretary of the Interior and providing that such leases "shall be made under

such terms and regulations as may be prescribed by the Secretary of the Interior." The Secretary has promulgated regulations governing the leasing of restricted Indian lands, including Part 162, Title 25, Code of Federal Regulations. This scheme, with its source in the Constitution, is the entire body of law affecting business leases of Indian lands.

The Petition asserts the existence of a power of the Yavapai-Prescotts to cancel a business lease validly entered into pursuant to 25 U.S.C. § 415 without pointing to any constitutional, statutory or regulatory authority in support of this non-federal power over lands owned by the United States. This assertion is directly contrary to the constitutional requirement that only "Congress shall have power to dispose of and make all needful Rules and Regulations respec-

ting the Territory or other Property belonging to the United States." U.S. Const. art. IV, §3, cl. 2; See Wisconsin Central Railroad Co. v. Price County, supra.

B. The Board's administrative interpretation of the lease and 25 C.F.R. § 162.14 is compelled by the trust responsibility conferred upon the Secretary of the Interior relative to Indian lands.

The Yavapai-Prescott Community Reservation was created by statutes transferring land to the Secretary of the Interior with the express provision "that the title to such lands shall be held by the United States in trust for the Yavapai Indians." See n. 2 supra. No subsequent act of Congress has terminated this express trust. Once Congress has established a trust responsibility with an Indian tribe, Congress alone has the right to determine when this responsibility shall cease, and this right must be

exercised in plain and unambiguous language. See Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), and cases cited therein.

Perhaps the clearest statement regarding the existence and scope of the trust responsibilities of the United States with respect to the Yavapai-Prescotts is set forth in Section 34 of the lease with Kuykendall, which discusses the possibility of a termination of federal trust responsibilities over the leased land during the term of the lease:[13] "In the event of such termination, all powers, duties, or other functions of the Secretary of the Interior or his authorized representative shall terminate, and the responsibility for enforcing compliance with the covenants of

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[13] Section 34 of the lease is set forth in full in Appendix A-3 hereto.

this lease shall be assumed by the Lessor, Lessor's heirs, devisees, executors, administrators, or assigns." The second paragraph of Section 34 of the lease recognizes that a termination of the trust responsibility would be accompanied by the relinquishment of supervision of the lease, and further provides that any such relinquishment cannot be binding upon Kuykendall without appropriate notice stating the extent of such relinquishment. The basic outline is clearly marked: Where the trust responsibility of the United States exists and secretarial approval of leases of trust lands is required, the Secretary retains supervisory responsibility over the lease; where no trust responsibility exists, supervisory responsibility over the lease passes to ("shall be assumed by") the lessor. This is the outline followed with respect to the Five Civilized Tribes

(25 C.F.R. § 213.42) and the Crow Tribe. See n.11, supra, and 25 C.F.R. § 162.15(e).

Section 29 of the lease provides an additional benchmark with respect to the existence and scope of the federal trust responsibility with respect to the Yavapai-Prescotts.[14] This provision, which provides for arbitration when the parties to the lease are unable to reach an agreement,[15] further provides that the decision of the arbitration board is binding on the parties, but subject to the approval of the Secretary of the Interior. Section 29 goes on to make clear that, while the "Secretary may be expected to accept any reasonable decisions" reached by the arbitration board, the Secretary "cannot be legally bound by

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[14] Section 29 of the lease is set forth in full in Appendix A-2 hereto.

[15] Arbitration was invoked by Kuykendall. The Yavapai-Prescotts denied the applicability of the arbitration provision.

any decision which might be in conflict with the interests of the Indians or the United States Government."

The Board recognized that the lease interpretation urged by the Yavapai-Prescotts was bottomed on the proposition that Section 30 of the lease constituted a delegation of secretarial authority to cancel leases and found: "It is difficult, in view of the general tenor of the lease document, to accept their [the Yavapai-Prescotts'] assumption that the use of the words 'and/or' in Clause 30 constituted a delegation of secretarial authority to administer leased trust property contrary to Departmental regulations." 8 IBIA 76, 85-86; Petition App. C at 8-9. The Board then set forth in detail this "general tenor" of the lease, demonstrating the Secretary's continuing supervisory responsibilities over these

trust lands. 8 IBIA 76, 85 n.12; Petition App. C at 9.

In the face of such overwhelming evidence of the Secretary's continued involvement in the affairs of this lease, the Yavapai-Prescotts' contention that the lease, by its terms, constituted a decision by the Secretary to absent himself from deciding whether termination was appropriate is preposterous. Even if the Secretary sought to so absent himself, he is without authority to do so. The trust responsibility may only be terminated by Congress, not by administrative action. See Jicarilla Apache Tribe v. Supron Energy Corp., 479 F.Supp. 536, 553 (D.N.M. 1979).

C. The Board's administrative interpretation of the lease and 25 C.F.R. § 162.14 is not contrary to congressional policies relative to tribal self-government.

This Court has recognized three statutes -- the Indian Reorganization Act

of 1934, Ch. 576, 48 Stat. 984, 25 U.S.C § 461 et seq., the Indian Financing Act of 1974, 88 Stat. 77, Pub.L.No. 93-262, 25 U.S.C. § 1451 et seq., and the Indian Self-Determination and Education Assistance Act of 1975, Pub.L.No. 93-638, 88 Stat. 2203, 25 U.S.C. § 450 et seq. -- as evidencing "to varying degrees a congressional concern with fostering tribal self-government and economic development." Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155 (1980). None of these statutes, however, evidence a relinquishment in favor of Indian tribes of any portion of Congress' authority to make needful rules and regulations respecting property belonging to the United States. "When Congress intends to delegate power to turn over lands to the Indian permanently, one would expect to and doubtless would find definite indi-

cations of such a purpose." Hynes v. Grimes Packing Co., 337 U.S. 86, 104 (1949). Nor do these statutes evidence a congressional intent to diminish the trust responsibilities of the United States. To the contrary, both the Indian Self-Determination and Education Assistance Act of 1975 and the Indian Reorganization Act of 1934 specifically reaffirm the unaltered continuation of the trust responsibilities of the United States. 25 U.S.C. §§ 450n, 462.

D. The Board's administrative interpretation of the lease and of 25 C.F.R. § 162.14 is not contrary to this Court's pronouncements relative to tribal self-government.

This Court has affirmed the power of Indian tribes to punish tribal members, to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. Montana v. United States, 450 U.S. 544, 564 (1981). "But

exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." Ibid. As a general proposition, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Id. at 565.

Although this Court has recognized the exercise of tribal civil authority over the activities of nonmembers, in each instance tribal authority was either consensual by the nonmember, see Williams v. Lee, 358 U.S. 217 (1959) (a non-Indian plaintiff could maintain a suit in tribal court against an Indian defendant), or exercisable only with the approval of the Secretary of the Interior. See Washington v. Confederated

Tribes of Colville Indian Reservation, supra at 144 ("These ordinances have been approved by the Secretary of the Interior . . ."); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 136 (1982) ("The ordinance was approved by the Secretary . . ."). This Court in Merrion specifically acknowledged secretarial approval as a constraint on tribal civil authority over nonmembers: "Of course, the Tribe's authority to tax nonmembers is subject to constraints not imposed on other governmental entities . . . the Tribe must obtain the approval of the Secretary before any tax on nonmembers can take effect." Id. at 141.[16/]

16/ Two early federal decisions are often cited in support of tribal civil authority over nonmembers. Morris v. Hitchcock, 194 U.S. 384 (1904); Buster v. Wright, 135 F. 947 (8th Cir. 1905). The tribal enactment in each of these

(Footnote continued on next page)

In the present case, the Yavapai-Prescotts seek to assert civil authority over Kuykendall without the approval of the Secretary of the Interior and, indeed, in the face of a specific finding by the Board that the Secretary never intended to confer such authority on the Yavapai-Prescotts. The decisions of this Court do not countenance the existence of such unfettered tribal powers over non-members.

16/ (Footnote continued from previous page)

decisions was not based solely upon the "sovereign powers" of an Indian tribe but, rather, was authorized by the Curtis Act of June 28, 1898, Ch. 517, 30 Stat. 495. The Curtis Act specifically provided that tribal enactments were not effective until approved by the President of the United States, and enforcement was by federal officials (not tribal officials) pursuant to regulations promulgated by the Secretary of the Interior. "This law of the Creek Nation was in legal effect a law of the United States, because it was authorized by treaties, acts of Congress, and judicial decisions of this nation [the United States]." Buster v. Wright, supra at 956.

CONCLUSION

The decision of the Ninth Circuit upholding the Board's decision does not present any broad policy issues warranting this Court's grant of a writ of certiorari.

No conflict between the circuit courts or with any decision of this Court is presented. The decision of the Board interpreting the lease, as upheld by the Ninth Circuit, does not present any special or important issues warranting this Court's discretionary review. The Petition should be denied.

RESPECTFULLY SUBMITTED this 30th day of September, 1983.

SNELL & WILMER

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APPENDICES

CONTENTS OF APPENDICES

APPENDIX A — PAGE

Portions of lease between Marlin D. Kuykendall and the Yavapai-Prescott Community Association

1. Introductory paragraph — A-1-1
2. Section 29 — A-2-1
3. Section 34 — A-3-1

APPENDIX A-1

THIS CONTRACT is made and entered into this 11th day of September, 1969, by and between The Yavapai-Prescott Community Association hereinafter called the Lessor, whose address is P. O. Box 1390, Prescott, Arizona, and Marlin D. Kuykendall, hereinafter called the Lessee, whose address is P. O. Box 911, Prescott, Arizona, under the provisions of the Act of August 9, 1955 (69 Stat. 539) as implemented by Part 131, Leasing and Permitting, of the Code of Federal Regulations, Title 25 - Indians, and any amendments thereto which by reference are made a part hereof.

APPENDIX A-2

29. ARBITRATION

Whenever during the term of this lease the Lessee and the Lessor are unable to reach an agreement as required by this lease, and it becomes necessary to submit a matter to arbitration for settlement, an Arbitration Board shall be established. Said Arbitration Board shall consist of three persons, one member to be selected by the Lessee, one member to be selected by the Lessor, and the third to be selected by the other two members. The decision of the majority of the members of the Arbitration Board so constituted shall be binding on the parties, subject to the approval of the Secretary. The costs of such Arbitration Board shall be shared equally by the Lessee and the Lessor. It is further understood and agreed that the Secretary may be expected to accept any reasonable

decisions reached by said Arbitration Board, but he cannot be legally bound by any decision which might be in conflict with the interests of the Indians or the United States Government.

APPENDIX A-3

34. TERMINATION OF FEDERAL TRUST

Nothing contained in this lease shall operate to delay or prevent a termination of Federal trust responsibilities with respect to the land during the term of this lease; however, such termination shall not serve to abrogate this lease. In the event of such termination, all powers, duties, or other functions of the Secretary of the Interior or his authorized representative shall terminate, and the responsibility for enforcing compliance with the covenants of this lease shall be assumed by the Lessor, Lessor's heirs, devisees, executors, administrators or assigns.

Should the Secretary of the Interior, or his authorized representative, at any time during the life of this instrument, relinquish supervision because of termination statute, the removal

of the trust or restricted status from all or part of the acreage covered hereby, or for other causes, such relinquishment shall not bind the Lessee until said Lessee shall have been given thirty (30) day notice thereof by the Secretary. The notice shall state the extent of relinquishment or supervision and contain the name and address of the Lessor, or Lessor's successors in interest, as of the date of such notice, and any future payments due under this contract shall be payable thereto.

CERTIFICATE OF SERVICE

Robert B. Hoffman, being a member of the bar of this Court, hereby certifies:

1. That he is an active member of the bar of this Court and that he is an attorney for appellant herein.

2. That on this 30th day of September, 1983, the Brief in Opposition to Petition for Writ of Certiorari has been served upon counsel of record and the Solicitor General of the United States in accordance with the provisions of Rules 28.3 and 28.4(a) of the Rules of this Court by placing three copies of the same in the United States mail, first class postage prepaid to each of the foregoing at the following address:

Philip E. Toci
Toci, Murphy & Beck
Post Office Box 591
Prescott, Arizona 86302

Solicitor General
United States Department of Justice
Washington, D. C. 20530

3. That the foregoing represents service on all parties required to be served under the provisions of Rule 28, Rules of the United States Supreme Court.

Robert B. Hoffman

Robert B. Hoffman